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Supreme Court of the United States

OCTOBER TERM, 1946

No. 764

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

REMICK MUSIC CORPORATION,
Respondent.

No. 765

PEONY PARK,
Petitioner,

v.

M. WITMARK & SONS,
Respondent.

No. 766

LLOYD G. FOX,
Petitioner,

v.

CHAPPELL & CO., INC.,
Respondent.

No. 767

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

JURISDICTIONAL STATEMENT

Judicial Code, Sec. 240a as amended, being Sec. 347a, Title 28 U. S. C. A., and Supreme Court Rule 38 form

the statutory ground and court rule for granting or denying this writ of certiorari.

STATEMENT OF THE CASE

1. Specific statement of facts, law, and reasons advanced by the petitioners for allowance of the writ, with proper reference to the record and decisions, will follow after this brief statement of the nature of the case.

2. These cases involve infringement suits, brought by the respondents, music publishing houses, as proprietors of the copyrights on certain popular musical compositions, for unlicensed singing and playing thereof, not for copying, vending, plagiarizing, or similar violations. The defendants below and now petitioners for this writ are establishments who engaged musicians who had bought the composition, to play and sing such music on the premises of petitioners and elsewhere. The federal trial court in Omaha held that the infringements alleged had taken place. Some eleven cases, involving seventeen counts, were brought at one time by respondents against petitioners and other similar establishments in Nebraska. The trial court held that the National Copyright Act had been violated by the petitioners and rendered judgments for damages against the respective petitioners in favor of the respective respondents in each case separately. One of the petitioners' defenses raised by answer was the protection of a state statute passed by the legislature of the State of Nebraska in 1937, especially one portion of the statute which applied to all music publishers including respondents. That portion of the state act was

a state regulatory measure. It required all publishers of musical compositions to collect their license fees, for the right to sing and play the music, at the time the reproduced copies were offered for sale by music stores and elsewhere and sold to musicians and the public generally throughout Nebraska. The sales were made from retail stores in Nebraska that had bought the sheet music and orchestrations from respondents as publishers. The pertinent section was held by the United States District Court in these infringement suits as no defense because unconstitutional and not applicable to respondents, and the sections of the state statute applicable to respondents were thus nullified by a federal trial judge.

3. Also the petitioners plead as another defense that Section 1e of the National Copyright Act gave neither the respondents nor any other copyright proprietor any statutory right to further contribution after a copyrighted musical composition of the class involved in these cases had been reproduced in copy form for sale and sold to the public, as was done in the instances set forth in these cases. This point was raised for the first time since the enactment of the Copyright Act in 1909. The point was likewise decided adversely to the petitioners by the United States District Court at Omaha, and held no defense to the infringement suits.

4. The United States Circuit Court of Appeals for the Eighth Circuit affirmed the District Court on its ruling on all points of defense, and affirmed the judgments. There were no disputes on the facts concerning the ownership of the copyright and the renditions as alleged in the complaints as filed.

5. It will be shown, as hereinafter more definitely pointed out by specific references to the records and citations, that important questions of national concern are involved; that conflicts exist between circuit courts on important issues hereinafter set forth; that the letter and the plain purpose of the National Copyright Act in its application throughout the entire United States have been erroneously construed by the Eighth Circuit in each of these cases.

6. The cases were consolidated for trial and for hearing on appeal by agreement of parties. The legal questions involved are the same in all cases. Accordingly all four cases are similarly consolidated in this petition for writ of certiorari.

FIVE REASONS ADVANCED FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

I.

1. The petitioners request that writ of certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit in order that the final opinion and judgments rendered therein on October 23, 1946 (U. S. C. C. A. Record, p. 313, submitted herewith), may be reviewed by the United States Supreme Court, and upon hearing that decision be reversed and the causes dismissed. The said Eighth Circuit opinion was rendered by and the hearing heard before Gardner, Woodrough, and Riddick, circuit judges, affirming the decision and judgments of the United States District Court for the District of Nebraska, Omaha Division (U. S. C. C. A. Record, p.

48, submitted herewith). In these above-captioned consolidated cases the decision and judgments were rendered by the Honorable John W. Delehant, the federal trial judge, on December 9, 1944 (58 F. Supp. 523). The record from the Eighth Circuit will be referred to hereinafter as "R. ____." Appended to petitioners' brief filed in the Circuit Court of Appeals, where petitioners herein were appellants, is an appendix containing important statutes and other official documents necessary for ready reference in the consideration of this petition for writ of certiorari. That brief and appendix are submitted likewise with the record from below, and will be referred to herein as "br. apdx. ____." These statutes and documents referred to in the appendix to the brief are:

(a) A Nebraska state legislative bill prohibiting monopolies by any person or persons dealing in public performance rights on musical compositions, even though such composition may have been copyrighted under the National Copyright Act. Within that state act was also a regulatory section requiring all music publishers, acting free from concerted action, to collect their prices for public performance for profit at the time the reproduced copies are sold to the public in Nebraska, and thus free the musician-purchaser, and those engaging him from liability for copyright infringement—when and if a copyrighted song thus purchased in Nebraska at a music store, for example, is sung or played in public for profit in Nebraska. (Br. apdx. 1-15. Revised Statutes of Nebraska 1943, Sec. 59-1303.)

(b) All sections of the National Copyright Act here in question. (Br. apdx. 16-23. 17 U. S. C. A. Secs. 1,

2, 5, 11, 12, 25(b) Fourth, and 41; 1945 pocket supplement to 17 U. S. C. A., Rules and regulations for the registration of claims to copyright, Secs. 201.1-201.25 of Title 37 of the Code of Federal Regulations.)

(c) Congressional Report No. 2222 (1908-09) submitting for enactment to Congress the present National Copyright Act which became a law on March 4, 1909 (br. apdx. 24-32).

(d) A description of all copyright laws passed by Congress from 1793 to date, with reference to the statutes at large and where found (br. apdx. 55).

(e) The opinion, findings of fact, conclusions of law, and decree in a previous case wherein the same Nebraska state act (br. apdx. 1-15) was declared totally unconstitutional by a three-judge federal court in Nebraska on December 28, 1939. The opinion was rendered and the hearing had before said statutory court consisting of the aforesaid Eighth Circuit Judge Archibald K. Gardner, presiding, and District Judges Munger (now deceased) and Donohoe of Nebraska. The said previous opinion given in 1939 is reported in *Buck v. Swanson,* 33 F. Supp. 377, and the unreported findings, conclusions, and decree are set forth in the appendix to the petitioners' brief in the United States Circuit Court of Appeals (br. apdx. 33-52). By direct appeal to the United States Supreme Court the aforesaid three-judge decision nullifying the said Nebraska state statute was reversed and the case dismissed by the United States Supreme Court on May 27, 1941. The opinion is *Marsh v. Buck,* 313 U. S. 406. A companion case from Florida (*Watson v. Buck,* 313 U. S. 387) was decided at the same time. The opin-

ion was delivered by Justice Black and concurred in by all members of the Court except Justice Murphy, who was not sitting. The United States Supreme Court in those cases held as valid the Nebraska statute above cited prohibiting persons and firms having a monopoly in the subject matter of public performance for profit on copyrighted musical compositions from doing business in the state. In reference to the regulatory provision applicable to music publishing houses and the respondents herein, the United States Supreme Court refused to declare the same invalid. The three-judge court declared the section invalid. The High Court did state it would meet particular problems that might grow out of the enforcement of the act, preferably after the highest state court had passed upon the same. The state court has not done so; it could not, as an infringement suit is of federal jurisdiction, and the regulatory measure applicable to respondents was a defensive matter in an infringement suit in the federal court.

2. It appears to petitioners that the United States Supreme Court has already, to the extent of that section as well as the monopoly section, declared itself on the validity. Petitioners so claim, based upon the foregoing references to the sections of the act and the citations to the cases construing them.

3. The record will show that after the judgments were rendered in the cases at bar by the trial court and while a motion for new trial was pending, the legislature of the State of Nebraska repealed the Nebraska statute. The trial court's decision in the cases at bar nullifying the protective section (br. apdx. 4-5, Sec. 2A and B)

opened the way for an avalanche of additional infringement suits against Nebraska users including petitioners which would have been confiscatory of their respective businesses (R. 87-9). Accordingly the state legislature repealed the act, effective in August 1945, long after the cases were concluded in the trial court.

4. Respondents' amended petition (R. 8-9) filed with the trial court stated that the respondents did not attempt to comply with the sections of the Nebraska statute (Sec. 2A and B) because they did not sell or offer for sale the musical compositions in question in the state, and said sections were violative of the state Constitution as well as the federal Constitution and Section 1e of the National Copyright Act. The nullification of the sections of the state act above referred to resulted in a boycott by respondents against the State of Nebraska on all commercially usable music. The respondents' organization ASCAP had been prohibited from doing business within the state because it was an unlawful monopoly, as declared by the Supreme Court of the United States on May 27, 1941, in 313 U. S. 406. In 1942 and 1943 a number of actions were filed by the respondents, of which the cases at bar are a part. With the judgments rendered against the petitioners in the amount of $250.00 for each rendition and $150.00 attorney fees (R. 82), as a matter of mathematical deduction and general knowledge, it is obvious that an establishment using music might readily be subjected to damages from a respondent music publisher in an amount equal to twenty times $250.00 or $5,000.00 plus attorney fees in one evening. Even more than twenty musical numbers are frequently

played from one music publisher's catalog.

5. The question of the effect of the repeal of the Nebraska statute was not raised by the respondents in the United States Circuit Court of Appeals. That court, however, on its own motion treated the matter as if the repeal question had been raised and as if that court had been asked to take the repeal into consideration in its decision. At R. 328 the Circuit Court of Appeals stated in its opinion as follows:

> "* * * 'A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law.'" (Citing the standard cases in an attempt to sustain that view.)

As a bare statement of the common law the statement is correct. It has no application to the State of Nebraska and the repeal by the legislature of Nebraska of the statute for the following reasons:

6. In 1913 Nebraska passed a statute preserving the existing rights of parties in pending actions, after repeal. This law was in force and effect at all times mentioned herein and governs the law in regard to repeal.

> R. S. N. 1943, Sec. 49-301—"Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

7. Prior to 1913 the repeal of a statute might have been construed in accordance with the statement in the Circuit Court's opinion but not after 1913. In *Kleckner v. Turk,* 45 Neb. 176, 63 N. W. 469, decided in 1895, the Nebraska Supreme Court stated:

> "As a general rule, the repeal of a statute which confers the right to an action, the remedy provided existing solely by and through such statute, or the repeal of a penal statute, abates a suit pending to enforce the remedy provided or destroys any right of action which has accrued thereunder; but in states where a general saving clause has been enacted it enters into such repeal and renders it conditional, or inoperative upon the law, inasmuch as it might affect accrued rights of action or pending suits."

8. After the passage of the statute the Supreme Court of the State of Nebraska in 1935 in *Helfrich v. Baxter,* 128 Neb. 281, 258 N. W. 532, stated:

> "Section 20-2141, Comp. St. 1929, as amended by chapter 41, Laws 1933, taking away the power of the court to enter deficiency judgments in equity actions, is not applicable to a suit pending at the time it went into effect by virtue of the general saving clause act, section 49-301, Comp. St. 1929."

The last citation in the quotation is the Nebraska saving clause statute above set forth.

9. With no opportunity before the United States Circuit Court of Appeals given the petitioners to explain this important matter to that court and in view of the fact that the repeal of the law of the State of Nebraska applicable to the respondents in reference to public performance rights affects every music user and musician in the State of Nebraska, it would seem that on this point the Court should allow certiorari. When the pertinent section of the Nebraska act was declared unconstitutional and nullified by a single federal judge and when the United States Circuit Judge who had previously nullified the same section and passed upon the question in the

case, petitioners believe this Court should allow certiorari rather than remand the cases on the point.

II.

1. Certiorari should be allowed because the United States Circuit Court of Appeals placed an erroneous construction upon Section 1e of the National Copyright Act (17 U. S. C. A.; br. apdx. 16). For the first time in the history of copyright litigation since the effective date of the act on March 4, 1909, this Court will be called upon to construe the true text of the National Copyright Act, if certiorari is allowed. The language of the true text was changed in two court decisions in United States Courts. All the following annotations appeared under the true text set forth in the official Code and in the United States Code Annotated.

2. It will be shown now that there exists a direct conflict between the Fourth Circuit and the Second Circuit as well as the Eighth Circuit in reference to the interpretation of Section 1 and Section 1e of the National Copyright Act (17 U. S. C. A.; br. apdx. 16).

3. To understand this rather complicated problem it is necessary to relate a short historical story. During the hearings held by Congress in 1908 and 1909 the respondents, through their organization then known as the Music Publishers Protective Association (now ASCAP), beseeched Congress to give them the right to publish and sell throughout the nation copyrighted musical compositions, and at the same time retain to themselves or their assigns the right to sing and play in public for profit

those same songs. The respondents would have had Congress open the gate for monopolistic and unfair practices in the matter of public performance rights for profit. This the congressional committee refused. We call the Court's attention to the comments of the congressional committee in reference to Section 1 (br. apdx. 24-31) and especially in reference to retention of rights and controls pertaining to rendition of music.

4. Congress gave the right of public performance for profit unless the copyrighted musical composition was reproduced in copy form for sale and sold to the public, in which event the right to sing and play it in public for profit went with the purchase price of the sheet music or orchestration. The copyright statute itself, Section 5 (br. apdx. 18) and the rules and regulations of the Register of Copyrights (1945 Cumulative annual pocket part, p. 107) clearly demonstrate the method Congress provided for the protection of the copyright owner if he wished to retain to himself the right to collect licenses or performing rights on copyrighted musical compositions. In the cases at bar it is admitted in the record that nothing but a published copyright provided by statute is here involved.

5. The statute makes particular reference to dramatico-musical compositions (Sec. 1d), for example, in which the right to public performance is protected only if the musical play is *not* reproduced in copy form for sale. Attention is called to the fact that Section 1a changed the common law. By the National Copyright Act the people gave to a copyright proprietor the right to sell

his copyrighted works on the open market and changed the common law by protecting him in such with the exclusive right "to print, reprint, publish, copy, and vend the copyrighted work." None of these things are involved in these actions. Congress in Section 1d gave the proprietor of a dramatic work the right "to perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; * * *."

6. That phraseology becomes important because the Second Circuit drew the distinction between Sections 1e and 1d in a case where there was involved the infringement of a dramatico-musical number so copyrighted under Section 1d and performed in a restaurant at the same time that an ordinary musical composition that had been copyrighted under Section 1e was played and sung therein. The former had not been reproduced in copy form for sale, while the latter had been reproduced in copy form for sale. The court held that there was a violation of the National Copyright Act in connection with the former, but there was not in reference to the latter. These citations will follow after we have called Your Honors' attention to the exact official wording of Section 1e which is applicable to the cases at bar and explains the error committed by the United States Court of Appeals for the Eighth Circuit:

> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make

> any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: * * *"

The subsection (a) referred to protects against others copying and vending the published work.

7. The respondents apparently were not satisfied with that text as passed by Congress, so litigation was started by them resulting in two cases wherein the foregoing official text was changed in the judicial opinions. The Circuit Court erred by setting forth the true text and supporting it with one decision wherein the text was changed. Whether the text was changed by inadvertence or perhaps by an agreement or understanding between the respective counsel, seems just now immaterial.

8. In *Hubbell v. Pastime Amusement Co.* (U. S. D. C. N. Y. 1917), 242 F. 1002 (not appealed), the court inserted a semicolon as urged by the plaintiff in that action (a director in ASCAP then and now) after the words, "musical composition," in the second line of Section 1e of the National Copyright Act. This request was granted by the judge. There was no real contest advanced by the opposition, apparently. The court said in that case:

> "But the controversy goes deeper than a mere matter of pleading, and I am entirely satisfied that a semicolon should precede the words 'and for the purpose of public performance for profit.' "

9. The Circuit Court of Appeals for the Eighth Circuit erred when it failed to recognize the avowed purpose back of this attempt by the respondents to change the law.

It will be seen that the law now reads in accordance with the decision above quoted:

> "(e) To perform the copyrighted work publicly for profit if it be a musical composition; * * *"

This gave one additional absolute right to those given by Section 1a. The semicolon tended to cut off what followed in that paragraph, i. e., that the musical composition might be reproduced in copy form for sale if its purpose was for public performance, but the public performance rights were lost if reproduced and obviously sold to the public. The author would be protected, of course, against printing, reprinting, publishing, copying, and vending the copyrighted work. But it did not give the proprietor the right to collect his public performance rights on copies that were reproduced in copy form for sale and sold to the public. If he wished to retain performance rights, he had two very clear courses to pursue under the statute: (1) He need not reproduce the copyrighted song in copy form for sale; instead, he could make by contract a private arrangement with whom he wished to profit by public performance for profit. (2) He could copyright his song as an unpublished work and deal guardedly with his copyright, as provided in Section 5 of the National Copyright Act and by following the very clear provisions in the regulations found in 17 U. S. C. A. pocket part for 1945. Otherwise he might prefer to sell the music "right and left" in copy form and make his money on royalties and profits on the sale, as was done by respondents herein.

10. In 1924 one of the respondents in the cases at bar, M. Witmark & Sons, obtained a decree in a case that it had instituted in 1921 or 1922 in the United States District Court in South Carolina entitled *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470. At page 477 of the opinion in that case the United States District Court, Honorable Ernest F. Cochran, in rendering his opinion, stated that he was copying the copyright statute from the defendant's brief, along with other matters. The judge said he so copied in order that there could be no doubt about the language. That court was therein passing upon the aforesaid same identical Section 1e of the National Copyright Act. That court's attention was apparently not called to the true text of the National Copyright Act by either the plaintiff's or the defendant's counsel. In the court's opinion in the "deciding part" of the case, the court said:

> "In order that this new view of the question may be clearly understood, I shall state it in counsel's own language which is as follows: * * *"

(The court was referring to the congressional hearing above referred to in reference to the National Copyright Act, and was passing directly upon said Section 1e.) The court then adopted and quoted from the brief before him:

> " 'During the progress of the hearings the words "or any part thereof" were dropped, the words "for profit" were added, and the law emerged in its present form as follows: "That any person entitled thereto * * * shall have the exclusive right * * * to perform the copyrighted work publicly for profit if it be a musical composition." ' "

11. Here, then, by judicial decree the semicolon previously inserted by a court was now changed to a period inserted by a court. Obviously, the National Copyright Act did not emerge in the form as stated.

12. The United States Circuit Court of Appeals in the cases at bar erred when it cited and followed that case from South Carolina as the law for the Eighth Circuit. The South Carolina case was appealed to the United States Circuit Court of Appeals for the Fourth Circuit and affirmed by a memorandum opinion found in 2 F. 2d 1020. In neither the South Carolina District Court nor in the Fourth Circuit Court of Appeals were the questions that are herein raised, submitted to the respective judges of those courts. Consequently, the fault, if one there be, lies with the respondent herein, Witmark, and its associates. They have benefited from 1924 to date by the use of the false text at the rate of about six million dollars per year (33 F. Supp. 377). There were 30,824 licenses enforced after this decision in 1924 up to 1941. There were 65 million public performances for profit annually in the United States according to the record in Marsh v. Buck. Each became an infringement under that decision (Vol. I, p. 198, 203 in record in *Marsh v. Buck*, 313 U. S. 406). Prior to this decision, the president of ASCAP in the last cited case (witness Buck) testified that no licenses were collected.

13. The trial court in the cases at bar rendered an opinion on these two particular above-analyzed cases. On the appeal to the United States Circuit Court of Appeals in the cases at bar, no further comment was made,

excepting to affirm the opinion from the District Court, which reads as follows (R. 26-7):

> " • • • One gathers from the briefs maintaining that position that the alleged miscarriage of judicial thinking is to be attributed to various factors, but principally to the astute, and not always too scrupulous, presentation of the position of the copyright proprietors, especially in the earlier and developmental stages of the decisions; to incompetent representation, and in certain notable instances to appearances pro se in behalf of adversely interested litigants; and, while intimated with gracious and becoming delicacy, to an occasional, though uncomplimentarily frequent, Homeric nod on the part of the federal judiciary upon both a horizontal and a vertical pattern. Industry and ingenuity have developed the argument, but they have not fortified it with conviction. And this court is not persuaded that it should presumptuously attempt to reverse the settled, and, it would seem, understanding and correct construction of the statute involved. The argument of counsel for the defendants upon this point and the authorities cited in its support have been carefully and repeatedly examined by the court in the present study; but the court is unable to assent to its validity."

14. Particular attention is called to this judicial comment because nowhere in the record of the cases will it be found that counsel for the petitioners herein made the slightest intimation of "miscarriage of judicial thinking," nor did the court below in these cases at bar ground his remarks upon any other facts to justify the conclusion above quoted. The New York and South Carolina decisions speak loudly against respondents. Why

the effort to insert first the comma and then the period unless for respondents' desire to have the act construed as if Congress had put the comma or period in the text?

15. Error has been committed, however, by the United States Circuit Court of Appeals for the Eighth Circuit in the cases at bar by not treating the problems before it with a proper analysis of Section 1e. In its opinion it copied for the first time in the history of the copyright litigation on this subject the exact wording of the statute, but the court supported its opinion with the South Carolina decision.

16. Any student of the law would naturally conclude that public performance rights were a plain, distinct right, the same as protection against plagiarism, if the student were given a text that read that the copyright proprietor shall have the exclusive right "to perform the copyrighted work publicly for profit if it be a musical composition." But that is not the law nor is it the text of the copyright statute.

17. Petitioners pray that the writ may be allowed and that petitioners be granted an opportunity to present to this High Court the complete history of national copyright legislation and the decisions of the courts that prompt correction by our judicial branch of the government. To the end that this vast control now exercised by the respondents may be declared as unlawful and in violation of the National Copyright Act as passed by Congress, this writ is requested.

18. Furthermore, in the record before this Court the witness Paine stated, as manager of ASCAP (R.

299), in reference to the enormous number of public performance rights vested in the respondents' organization ASCAP,

> "It would take well over a year to do the thing, and I would never be sure that it would be accurate at that, because of the tremendous number of arrangements and various forms in which a musical work is published."

19. The respondent, Remick Music Corporation, is one of a group of music publishing houses that own the public performance rights on thousands of popular musical compositions. All the capital stock of Remick and all its subsidiaries is owned by the Music Publishers Holding Corporation. The Music Publishers Holding Corporation owns all the capital stock of Edward A. Stagey Co. The last company actually prints and does the mechanical work of reproducing the musical compositions in salable form for almost all publishers. All the capital stock of the Music Publishers Holding Corporation is owned by three men (R. 166-8). The president of each corporation is Herman Starr, an officer and director of ASCAP (R. 209-212).

20. For the other group, being the Chappell & Co., Inc. group, see the testimony of Max Dreyfus (R. 218-220). Max Dreyfus is likewise an officer and director in the ASCAP organization.

21. It is this monopolistic control which Congress and the National Copyright Act denied the respondents, according to the act itself and as confirmed by the report of the congressional committee (br. apdx. 24). Yet

these practices have gone on. No court's attention has been directed to these strange attempts by respondents to change the law until in these cases at bar. The United States Circuit Court of Appeals for the Eighth Circuit would permit the practices to continue in reference to public performance rights even after its attention has been called to the errors. Certiorari should be allowed.

III.

1. The United States Circuit Court of Appeals for the Eighth Circuit again erred when it denied the petitioners' appeal for a decision in accordance with decisions in the Second Circuit. Petitioners believe that the National Copyright Act, Section 1e, was in those decisions properly construed and that those decisions do constitute the law of the land on the subject matter of public performance for profit on musical compositions.

2. In 1915 in the case of *Herbert v. Shanley* (U. S. D. C. N. Y.), 222 F. 344, on appeal 229 F. 340, 134 C. C. A. 460, 2 C. C. A. (1916); and *John Church Co. v. Hilliard* (U. S. D. C. N. Y.), 221 F. 229, on appeal 136 C. C. A. 639, 2 C. C. A. (1916), 228 F. 1021, the District Court (and the Circuit Court on appeal) dealt with two alleged infringements of copyright, one a dramatico-musical play, popularly known as a "comic opera," and another as an ordinary musical composition such as in the cases at bar.

3. The copyright proprietor brought the action in the federal District Court for the Southern District of New York in 1915. The Copyright Act then had been in force and effect since March 4, 1909, and there were

found no cases in the digests for infringement of public performance for profit on copyrighted musical compositions that had been reproduced in copy form for sale and sold to the public. Respondents' organization (ASCAP) decided to try out the question. The District Court held and the Circuit Court affirmed the answer to the question in the following language:

> "However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave unto the public domain all musical rights, except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated.
>
> * * *
>
> "This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright but that is because the plaintiff wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected; but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright while they prevent the public from enjoying the corresponding rights."

4. Also in *Church v. Hilliard,* 221 F. 229, affirmed in 228 F. 1021, the Second Circuit held:

> "When the copyright proprietor of a musical composition sells printed copies of it to the public, the performing rights go with them."

5. One other question in the case was whether or not an establishment was liable for infringement of a public performance for profit if an admission were not charged at the door. The Circuit Court held no infringement unless admission was charged. It was ultimately held, however, by appeal to the Supreme Court of the United States in *Herbert v. Shanley,* 242 U. S. 591 (1917), that it was not necessary that admission be charged at the door in order that the performance within be a public performance for profit, and in that regard only the Circuit Court was reversed. The cases in the District, Circuit, and United States Supreme Courts all held that a certain dramatico-musical composition that was performed in the restaurant had not been reproduced in copy form for sale, and therefore there was an infringement of copyright, of course, if an infringement could take place without an admission being charged at the door. The Supreme Court of the United States held that the infringement could take place even though an admission was not charged at the door. In that regard the High Court reversed the United States Circuit Court of Appeals for the Second Circuit. But in doing so the High Court said, speaking through Justice Holmes in 1917,

> " * * * There is a copyright for the opera and also one for the song which is published and sold

separately. This the Shanley Company caused to be sung by professional singers upon a stage in its restaurant on Broadway accompanied by an orchestra. The district court after holding that by the separate publication the plaintiff's rights were limited to those conferred by the separate copyright—a matter that it will not be necessary to discuss—followed the decisions in 136 C. C. A. 639, 221 Fed. 229, as to public performance for profit. 222 Fed. 344. The decree was affirmed by the Circuit Court of appeals, 134 C. C. A. 460, 229 Fed. 340."

6. Under this stage of court records, petitioners maintain that there was a conflict actually between the Fourth Circuit and the Second Circuit. Now there is a conflict in law with the Eighth Circuit. The Eighth Circuit is in conflict even with the Fourth Circuit, even though it arrived at the same conclusion. The error in the Eighth Circuit is that it placed in its opinion in the cases at bar the exact language of the copyright text, but it cited the decision of the Fourth Circuit from South Carolina and then *Herbert v. Shanley* to support the reasoning. This cannot logically be accepted in law. Under such circumstances, certiorari should be allowed.

7. The importance of a proper construction of the true text of the National Copyright Act, petitioners respectfully submit, is a matter of national importance. When the above-cited case from Nebraska was before the Supreme Court of the United States in 1941, the income from these claimed rights was about six million dollars per year (33 F. Supp. 377). It no doubt has increased. The number of music publishers holding public performance rights was 125 in 1941, while in the

cases at bar the record shows the number had grown to 369 in 1945. The composers have grown from 1200 to 2289 (R. 298-9) in the same period. These alleged rights were enforced by infringement suits, as many as approximately 80 in the various district courts of Nebraska alone, in the ten years immediately preceding the enactment of the Nebraska statute (R. 286). Throughout the United States on that basis there would be many thousands of infringement suits pending to force a business establishment to take out a license to keep from liability for infringement, even though musicians had been engaged to play musical compositions upon the premises and had their own music or played mostly "by ear."

8. The protection that the music users of America have under the National Copyright Act would be destroyed, and by court decision no state law could effectively be passed to protect its citizens, if the Eighth Circuit Court's opinion is allowed to stand.

9. An unlimited and uncontrolled price must be paid to respondents by all who must have music renditions commercially on their premises, or go out of business (33 F. Supp. 377). This is contrary to the intention of Congress in granting the copyright privilege and contrary to the National Copyright Act itself.

10. The police power of a state extends to proper regulation of the use that may be made within the state of any article brought therein for the purpose of sale. The National Copyright Act is not violated when the originators or manufacturers or publishers of such items are required by state law to collect their prices at the

time of sale as required by the Nebraska statute (br. apdx. 4-6).

11. In *Marsh v. Buck,* 313 U. S. 406, and the companion case, the High Court considered this identical state law and the identical section.

12. If regulatory features applicable to the individual publisher, as in Sections 2A and B of the act (br. apdx. 4-6), must be enacted in order to reach the monopolistic vice, then it would seem that the whole Nebraska act, including said sections, did constitute a complete scheme for regulating the public performance for profit monopolistic practices, as might well be inferred from the opinion in *Marsh v. Buck,* 313 U. S. 406 (1941).

IV.

1. Certiorari should be allowed because the trial court found, and the Circuit Court affirmed, the proposition advanced by respondents that certain wording placed on the reproduced copies for sale gave notice to the purchaser that the public performance rights were reserved. The publisher-respondents added to the statutory copyright notice the words, "All rights reserved including public performance for profit." The statement appears on each musical number. By that wording the Circuit Court, in effect, held that the copyright privileges were enlarged. That cannot be done. Those words were legally ineffective as reservations of the right to sing and play the music purchased. The Second Circuit Court of Appeals in 1940 passed upon the legal effect of just such notices on copyrighted material and that which was

not copyrighted. The court held that in reference to the material with the notice attached but not copyrighted, it was ineffecive legally to change the common law dedication to the public when reproduced in copy form for sale and sold. The wording on the copyrighted material could not enlarge the scope of the copyright as defined by statute. Certiorari was denied in the case. (*R. C. A. Mfg. Co. v. Whiteman* (2 C. C. A. 1940), 114 F. 2d 86.)

2. In the event certiorari is allowed, all circuit courts of appeal except the Eighth Circuit will be shown to have held in both copyright and patent matters that the reservation of a right is inimical to the long established principles of unrestricted use in the alienation of property.

3. Some such cases to be analyzed for the Court to prove the petitioners' point of law will be *Straus v. Victor Talking Machine Co.* (1917), 243 U. S. 490; *Bobbs-Merrill Pub. Co. v. Straus,* 210 U. S. 339; *Caliga v. Inter Ocean Newspaper Co.* (1909), 215 U. S. 182; *Univis Lens Co. v. U. S.* (1942), 316 U. S. 241. Also the petitioners will demonstrate the applicability to the United States Supreme Court of the method of protection to the proprietor if he wishes to withhold uses and rights in his copyright as provided by the rules which must be followed. (1945 pocket supplement, pp. 110-11 of 17 U. S. C. A., Sec. 201.1, 201.6(f), 201.7(b), and 201.8; also Sec. 201.12 showing choice of copyright privileges offered to the proprietor—"E. New musical compositions published for first time," "E2 Musical compositions not reproduced for sale;" Secs. 11 and 12, National Copyright Act.)

4. Furthermore, it will be shown that Section 41 of the National Copyright Act (br. apdx. 23) was cited by the trial court and affirmed by the Circuit Court in the cases at bar as a statute conferring the right to withhold or restrict the use or price of the copyrighted material after sale. Congress said in its report concerning said Section 41 exactly the opposite:

> "* * * Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale." (br. apdx. 32)

5. Section 41 was enacted without change as recommended by the committee. It would seem, therefore, that unless the United States Supreme Court allows the writ and reviews the decision and reverses the Eighth Circuit in these cases at bar, a rule of law will stand in the Eighth Circuit permitting a copyright proprietor to sell his wares by affixing a notice of terms and restrictions for use contrary to the Second Circuit and, as petitioners believe, in conflict with the spirit of decisions of the United States Supreme Court in similar matters.

V.

1. The Eighth Circuit Court of Appeals committed error, and certiorari should be allowed, because by that error the United States Circuit Court of Appeals held that the Nebraska statute Sections 2A and B, intended to apply to the respondents (br. apdx. 4-6), actually would have no application because the subject matter in said statute was sheet music and orchestrations moving

in interstate commerce. Such position is untenable, as the facts in the record show that this merchandise was purchased from salesmen who called upon the music stores in Nebraska and sold from catalogs, or the music stores in Nebraska wrote to the respondent publishers in New York and ordered musical compositions. These were bought and paid for by the music stores, placed on their shelves, and sold in the due course of business at retail prices fixed on the sheets of music and orchestrations by the publishers. Musicians were given a 10% discount from the usual sales price when they purchased the music from the music store. Ordinarily, the price for an ordinary musical composition was thirty-five cents for sheet music and seventy-five cents for orchestrations. All that money went into the coffers of the local music stores in Nebraska, and the purchasers obviously became the owners of that which they had purchased for all uses. The musicians bought the music for the purpose of playing it in public for profit, and it was in form for that purpose when and as sold. A great many thousands of pieces are sold annually. (Witnesses Martha Marchant, R. 248; Gladys M. Follmer, R. 250; Julia Morse, R. 252; Eddie Sheffert, R. 258; Dave Haun, R. 260; Paul Moorhead, R. 268; Arthur Randall, R. 270; Deb Lyon, R. 282; Joseph Malec, R. 284.)

2. Within that purchase price was included a royalty, usually of three cents on the sheet music and five cents or more on the orchestrations. By contract existing between the composer and the publisher, this royalty was equally divided between them. Also there were many other royalties and compensations to the composer and

publisher on the copyrighted musical compositions, such as stage rights, motion picture rights, phonograph rights, all of which were a matter of contract between the manufacturers or producers and the publisher on one side and between the publisher and the composer on the other. (See contracts between songwriter and publisher, R. 155, 165; contracts with ASCAP, R. 172, 177, 229.)

3. In the bulletin issued by the Department of Commerce for the United States Government for 1944, under the heading of musical compositions for that year 24 million copies were listed as sold to the public. Consequently, the business is a substantial one. Under the Nebraska statute, for such copies that were sold in Nebraska, compliance with the Nebraska statute would have required the publisher to increase his price in the State of Nebraska to cover any additional charges before sale. The publishers had fixed the price of thirty-five to seventy-five cents, and the same was stamped on the sheets of music, so that a compliance with the Nebraska statute would have been a simple matter. If throughout the United States twenty-five cents had been added to the price of each number sold and if 24 million copies of all copyrighted musical compositions had been sold in one year, six million dollars would have gone directly to the composer and publisher entitled thereto.

4. Thus the plan of the Nebraska statute was to do away with confusion and to place into the hands of the proper composer and the proper publisher whatever pay he desired for the uses to be made of the copyrighted material after sale. The Nebraska statute is, therefore,

in keeping as a matter of fact with the National Copyright Act, Section 1e above discussed, rather than being in conflict with it. Congress did not preempt the field of legislation on this matter. Therefore, the Eighth Circuit, in refusing to recognize the applicability of the Nebraska statute and in affirming the trial court's decision on the invalidity of the act, committed error, and certiorari should be allowed.

5. The petitioners, upon a review by the Supreme Court of the United States, will be able to show by the record more specifically that the singing and playing of a musical composition within the State of Nebraska through the agency of a human being, even from a sheet of music that came into the state by interstate commerce, is not governed exclusively by federal law.

6. The Eighth Circuit is in conflict with a decision in this regard of a three-judge federal court consisting of Circuit Judges Sanborn and Thomas and District Judge Sullivan (*Paramount Pictures v. Langer,* U. S. D. C. N. D. 1938, 23 F. Supp. 890). In that case a North Dakota statute was under attack as invalid, for the reason that its provisions interfered with interstate commerce, the National Copyright Act, and the Constitution of the United States in various particulars. The North Dakota act was passed by its legislature prohibiting a motion picture producer from owning or controlling a theater in the state of North Dakota in which that producer's films were exhibited. The defense was that the films came into North Dakota by interstate commerce and that they were all copyrighted and, in addition, contained

copyrighted material in the songs, scenarios, and so on. Nevertheless, in a very sound opinion that three-judge federal court within the Eighth Circuit held that the defense of interstate commerce and the National Copyright Act was of no avail and that the North Dakota act was in no way in conflict with either, nor with the Constitution of the United States.

7. There are many other cases of similar purport, as to both results and reasoning.

8. Certiorari should be allowed in order to eliminate a decision of the Eighth Circuit Court of Appeals in the cases at bar that denies a state its police power over the use of material sent into the state and sold within the state simply because said material was manufactured, produced, or published in an adjoining state, and even though it was purchased and became a part of the stock of merchandise owned by the Nebraska music dealer.

PRAYER

Wherefore, the petitioners, Interstate Hotel company of Nebraska, Peony Park, and Lloyd G. Fox, pray that the Supreme Court of the United States will allow writs of certiorari to issue to the United States Circuit Court of Appeals for the Eighth Circuit directing that court to certify and deliver to the Clerk of the Supreme Court of the United States the consolidated records in the cases set forth in the caption hereof, to wit, Interstate Hotel Company of Nebraska v. Remick Music Corporation, No. 13162; Peony Park v. M. Witmark & Sons, No. 13163; Lloyd G. Fox v. Chappell & Co., Inc., No. 13164; and

Interstate Hotel Company of Nebraska v. Jerome Kern and T. B. Harms Company, No. 13165; that these cases be consolidated for review before the Supreme Court of the United States; that upon a hearing, said opinion of the said United States Circuit Court of Appeals for the Eighth Circuit, rendered on October 23, 1946, wherein the judgments of the United States District Court for the District of Nebraska in said cases were affirmed, be reversed and said judgments vacated; that in the opinion of the Supreme Court of the United States, the claims and points of law of the petitioners which will be set forth in their brief and by further proceedings in this Court and in accordance with this petition for writ of certiorari, be announced and established in lieu of the opinion and decision of the United States Circuit Court of Appeals for the Eighth Circuit in these cases. The petitioners further pray for such other and additional relief as the Court may deem just and equitable in the premises, and that the respondents be required in the mandate of this Court to pay such costs, expenses, and attorney fees as may be proper in the premises.

Respectfully,

WILLIAM J. HOTZ,

HOTZ & HOTZ,

1530-5 City National Bank Bldg.,
Omaha, Nebraska

Attorneys for Petitioners.

The undersigned, as attorney for petitioners, by attaching his signature to this petition for writ of cer-

tiorari, certifies to the best of his knowledge and belief to the correctness of the matters herein set forth and to the good faith request of petitioners for the allowance of the writ of certiorari as prayed. Accordingly, by his signature the undersigned enters his appearance for the petitioners in the Supreme Court of the United States.

Done at Omaha, Nebraska, this 5th day of December, 1946.

William J. Hotz

The undersigned, one of the attorneys of record for the respondents in the above-entitled cases, does hereby acknowledge receipt of copy of the foregoing petition for writ of certiorari and a copy of the record as certified by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Done at Omaha, Nebraska, this 6th day of December, 1946.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Sections 1a and 1e of the National Copyright Act (17 U. S. C. A., br. apdx. 16), when applied to the respondent-publishing houses, deprive them of copyright privileges for infringement of musical compositions, be-

cause the respondents had elected to reproduce the musical compositions in copy form for sale and sell them generally to the public rather than withhold the public performance rights unto themselves by foregoing the reproduction in copy form for sale to the public.

Aldrich v. Remington Rand, Inc. (D. C. Tex., 1942), 52 F. Supp. 732.

Bobbs-Merrill Pub. Co. v. Straus (1908), 210 U. S. 339, 28 S. Ct. 722.

Isaac H. Caliga v. Inter Ocean Newspaper Co. (1909), 215 U. S. 182, 30 S. Ct. 38.

John Church Co. v. Hilliard (U. S. D. C. N. Y. 1915), 221 F. 229, 136 C. C. A. 639.

John Church Co. v. Hilliard, 242 U. S. 591, 37 S. Ct. 232 (Jan. 1917).

Herbert v. Shanley (U. S. D. C. N. Y. 1915), 222 F. 344.

Herbert v. Shanley (2 C. C. A. 1916), 229 F. 340, 134 C. C. A. 460.

Herbert v. Shanley, 242 U. S. 591, 37 S. Ct. 232 (Jan. 1917).

RCA Mfg. Co. v. Whiteman (2 C. C. A. 1940), 114 F. 2d 86. Certiorari denied.

Straus v. Victor Talking Mach. Co. (1917), 243 U. S. 490, 37 S. Ct. 412.

National Copyright Act (br. apdx. 16-23), March 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088. Sections 1(a), (b), (c), (d), (e); 2; 5; 9; 11; 12; 25; 34; 35; 40.

Rules and Regulations, Registration of Claims to Copyright, 37 Code of Federal Regulations, Ch. II as amended. 17 U. S. C. A., 1945 P. Pts., p.

107, Sec. 201.1; p. 110, Sec. 201.6; p. 110, Sec. 201.7; p. 111, Sec. 201.8; p. 112, Sec. 201.12.

Federal Copyright Acts from 1790 to 1909 and to date. (Taken from *Copyright Enactments of the United States,* 1783-1906—and to date. Compiled by Thorwald Salberg, Register of Copyrights; Bulletin No. 3, Second Revised Edition.) Br. apdx. 55.

Committee Report No. 2222 on Bill Enacting Copyright Act of 1909, 60th Congress, Second Session; to Amend and Consolidate the Acts Respecting Copyright. (Entire report found in *The Copyright Law;* Herbert A. Howell, recently Assistant Register of Copyrights; the Bureau of National Affairs, Inc., Washington, D. C., 1942) Br. apdx. 24-32.

II.

In order for the cases cited by respondents to the United States Circuit Court of Appeals for the Eighth Circuit to be binding as precedents, there must be an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties.

Hubbell v. Pastime Amusement Co. (U. S. D. C. N. Y. 1917), 242 F. 1002.

Mutual Benefit Health and Accident Assn. v. Bowman (8 C. C. A., 1938), 99 F. 2d 856 (Syl. 3 and 4 and cases cited).

Witmark & Sons v. Pastime Amusement Co. (U. S. D. C. S. C. 1924), 298 F. 470. Section 1e of the Copyright Act quoted at p. 477.

Witmark & Sons v. Pastime Amusement Co., 2 F. 2d 1020.

III.

The United States Circuit Court of Appeals for the Eighth Circuit committed reversible error when it relied upon Section 41 of the National Copyright Act as giving the right to a copyright proprietor to sell his copyrighted material and yet retain a control over the use for which it was intended.

Bobbs-Merrill Pub. Co. v. Snellenberg (C. Ct. Pa., 1904), 131 F. 530.

Bobbs-Merrill Pub. Co. v. Straus (1908), 210 U. S. 339, 28 S. Ct. 722.

Davenport-Quigley Expedition v. Century Production Co., (U. S. D. C. N. Y. 1937), 18 F. Supp. 974.

National Geographic v. Classified Geographic (D. C. Mass., 1939), 27 F. Supp. 655.

Patterson v. Ogilvie Pub. Co. (C. Ct. N. Y., 1902), 119 F. 451.

RCA Mfg. Co. v. Whiteman, 114 F. 2d 86. Certiorari denied.

Stevens v. Cady (R. I.), 14 How. 528, 14 L. Ed. 528.

Stevens v. Gadding, 17 How. 477, 15 L. Ed. 155.

Straus v. American Publishers Assn. (1913), 231 U. S. 222, 34 S. Ct. 84.

Univis Lens Co. v. U. S. (1942), 316 U. S. 241, 62 S. Ct. 1088.

Title 17 U. S. C. A., Sec. 41, 35 Stat. 1084 (br. apdx. 16).

Committee Report No. 2222 on Bill Enacting the Copyright Act of 1909. Section 41 (br. apdx. 32).

IV.

It falls within the police power of a state to enact reasonable regulations in reference to the public performance rights on music that is sold at the music stores in the state. The Nebraska statute (R. S. N. 1943, Sec. 59-1303-1304-1306; br. apdx. 4-6) is such reasonable regulation. For the federal court to strike it down constitutes reversible error.

Allen v. Riley (1906), 203 U. S. 347, 27 S. Ct. 95, and cases therein cited.

Buck v. Gallagher (D. C. Wash., 1940, before Haney, C. J., Bowen and Black, D. J.), 36 F. Supp. 405.

Buck v. Gibbs (D. C. Fla., 1940, before Hutcheson, C. J., Long and Barker, D. J.), 34 F. Supp. 510.

Buck v. Swanson (D. C. Neb., 1939, before Gardner, C. J., Munger and Donohoe, D. J. Findings of fact and conclusions of law not reported; copied in br. apdx. with opinion, p. 42-52), 33 F. Supp. 377.

Marsh v. Buck (May 27, 1941), 313 U. S. 406, 61 S. Ct. 969.

Paramount Pictures v. Langer (U. S. D. C. N. D. 1938, before Sanborn and Thomas, C. J., Sullivan, D. J., and cases therein cited), 23 F. Supp. 890.

Straus v. American Publishers Assn. (1913), 231 U. S. 222, 34 S. Ct. 84.

Watson v. Buck (May 27, 1941; concurrently decided with *Marsh v. Buck* as basic opinion), 313 U. S. 387, 61 S. Ct. 962.

Nebraska Act (br. apdx. 1-15).

V.

Copyright privileges may be denied to copyright proprietors who abuse the privileges. The alignment of copyright proprietors as officers and directors of an unlawful organization dealing in public performance rights, their refusal to deal in accordance with the laws of a state, and their attempts to destroy state statutes, constitute reasons for denial to such copyright proprietors of the petition of infringement. Neither the Nebraska state law nor the federal law makes any distinction for unlawful conduct as between the organization itself and the officers, directors, and members thereof.

Nebraska Cases

Bridgeport I. D. v. U. S. (8 C. C. A., 1930), 40 F. 2d 827.

Howell v. State (1909), 83 Neb. 448, 120 N. W. 139.

Johnson v. J. H. Yost Lumber Co. (1941), 117 F. 2d 53.

Marsh-Burke v. Yost (1915), 98 Neb. 523, 153 N. W. 573.

State v. Adams Lumber Co. (1908), 81 Neb. 392, 116 N. W. 302.

State v. American Surety Co. (1912), 91 Neb. 22, 135 N. W. 365.

State v. Nebraska Distilling Co. (1890), 29 Neb. 700, 26 N. W. 155.

State v. Omaha Elevator Co. (1906), 75 Neb. 637, 655, 106 N. W. 979, 110 N. W. 874.

State v. Standard Oil Co. (1900), 61 Neb. 28, 84 N. W. 413.

Younglaus v. Omaha Film Board of Trade (1932), 60 F. 2d 538.

Nebraska Statutes relating to monopolies, unfair practices, boycotting, etc. (R. S. N. 1943, Ch. 59).

Federal Court Cases

American Press Assn. v. U. S. (1945), 326 U. S. 1, 65 S. Ct. 1416.

Eastern New York Savings Bank v. Hahn (1946), ... U. S. ....., 66 S. Ct. 69.

Fashion Originators Guild v. F. T. C. (1941), 312 U. S. 457, 61 S. Ct. 703.

Fox Film Corp. v. Doyal (1932), 286 U. S. 123, 52 S. Ct. 546.

General Electric v. Hygrade Sylvania Corp. (U. S. D. C. N. Y. 1942), 45 F. Supp. 714.

Interstate Circuit, Inc. v. U. S. (1939), 306 U. S. 208, 59 S. Ct. 467.

Morton Salt Co. v. Suppiger (1942), 314 U. S. 488, 62 S. Ct. 402.

Paramount Famous Lasky, et al. v. U. S. (1930), 282 U. S. 30, 51 S. Ct. 42.

U. S. First National Pictures (1930), 282 U. S. 44, 51 S. Ct. 45.

30 C. J. S., Maxims, Sec. 89, p. 458—Public Policy.

VI.

Where the National Copyright Act specifically sets forth a statutory penalty of $10.00 for each infringement of a copyrighted musical composition, and where the language is clear and unambiguous and the report of the committee of the National Congress on the matter

specifically refused to place within the act a statutory penalty of $250.00, it is reversible error for an appellate court to award $250.00 for each infringement instead of $10.00 as the statutory award.

Title 17 U. S. C. A., Sec. 25 Fourth (br. apdx. 21-2).

Title 17 U. S. C. A., Sec. 40 (br. apdx. 23).

Congressional Committee Report No. 2222 (br. apdx. 32).

STATEMENT OF POINTS TO BE RELIED UPON FOR REVERSAL IN THE EVENT CERTIORARI IS ALLOWED

I.

Did the United States Circuit Court of Appeals for the Eighth Circuit, as a matter of law, commit reversible error by affirming the decision of the trial court and by granting respondents' prayer for damages and for injunction for infringement when it appears by the record in the cases

(a) That the Nebraska statute pleaded in defense (R. S. N. 1943, Ch. 59; br. apdx. 1-15) had been declared in 1941 by the Supreme Court of the United States a valid exercise of the state police power and was held to constitute a complete scheme for the regulation of unlawful combinations controlling public performance rights of copyrighted musical compositions?

(b) That each respondent was a member of ASCAP, and that its plan of operation was held by the Supreme

Court of the United States to fall squarely within the prohibitions of the state statute?

(c) That the Supreme Court of the United States had refused to declare Sections 1303-1306 (R. S. N. 1943) of said act invalid and in conflict with the National Copyright Act (br. apdx. 4-6) or any part of the Constitution of the United States, when that issue on those sections was presented to said Court by ASCAP and its members, which included the respondents?

(d) That each respondent by its amended complaint admitted that it had not complied with any section of the Nebraska statute?

(e) That neither the National Congress by the National Copyright Act nor the federal Constitution preempted the field of the state's rights to reasonably regulate and control the sale and use of copyrighted material within a state, whether owned or controlled by an unlawful combination or by individuals acting independently thereof?

II.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by refusing to hold petitioners free from liability for infringement as a matter of law under the provisions of the National Copyright Act (br. apdx. 16-23) in reference to public performance rights on copyrighted musical compositions, when it appeared that the musical numbers in question had been reproduced and published by respondents in copy form for sale and sold by them to the public gen-

erally, including Nebraska, for the obvious use of public performance for profit, and when the form in which the compositions were published for sale was adaptable for such use by the purchasing musicians?

III.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by affirming the trial court's decision that the petitioners' defense of unclean hands was not applicable as a matter of law, when it appeared

(a) That the respondents herein adhered as members to the ASCAP organization; that the officers or directors of respondents were officers or directors of ASCAP?

(b) That all the six musical compositions in question at the time of the alleged infringements bore the letters "ASCAP" and the seal of the American Society of Composers, Authors, and Publishers, and that this marking indicated public performance ownership rights in ASCAP?

(c) That each of the respondents as a member of ASCAP, and ASCAP itself, within a short period previous to the dates of the infringement suits, had been held criminally liable in a federal court for a violation of the terms of the Sherman Anti-Trust Act by dealing in public performance rights for profit as a combination in conjunction with the respondents as music publishers and with composers under its plan of operation? (*U. S.*

v. ASCAP, et al., Crim. O. 449, U. S. D. C. E. D. Wis., br. apdx. 53-4.)

(d) That the Nebraska statute (br. apdx. 1-15) in regard to prohibiting combinations and their members from dealing within the state, was in all respects similar to the Sherman Anti-Trust Act in reference to interstate transactions?

(e) That the respondents elected to boycott Nebraska users, including petitioners, by asserting in their amended complaints that they had not sold and would not sell their musical compositions in Nebraska?

(f) That respondents and other publisher-members of ASCAP had in the State of Nebraska, within ten years previous to the enactment of the 1937 state act, instituted approximately 79 infringement suits against Nebraska users to enforce ASCAP licenses for public performance rights, when it appeared that the respondents herein had assigned these rights exclusively to ASCAP, well knowing that said assignment would produce a result that would be in restraint of trade and against public policy and the laws of the State of Nebraska?

(g) That the same custom was being carried out by the respondents when they instituted the infringement suits at bar en masse to force petitioners to deal with respondents as an organization or be sued for infringement, contrary to the method provided by the Nebraska statute?

(h) That the Articles of Association of ASCAP provide that all license money obtained for public per-

formance, even if collected by individual members such as the respondents, must be paid into the ASCAP treasury for general distribution to all its members?

(i) That a reassignment by ASCAP to respondents of the public performance rights for Nebraska prior to suit failed to alter respondents' membership status in ASCAP or their financial interests therein or their contractual relationship, evidenced by their general contracts and the provisions of the Articles of Association?

(j) That each petitioner was a proprietor of an establishment which required the rendition of music in the operation of its business; that none were musicians; that the musicians engaged were professionals who made their own selections of musical compositions and rendered them with their own varying interpretations; that a contract or admonition by the petitioners to the musicians to play other than respondents' music might be ineffective to save the petitioners from confiscatory liability for infringement?

(k) That petitioners had acted in good faith and relied upon the previous decisions of the Supreme Court of the United States and the Nebraska statute, as did the musicians engaged by petitioners?

IV.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by affirming the judgments of the trial court, when it appeared from the record

(a) That the principal objective of all the infringement suits brought by the respondents was not in good faith to collect damages for infringement, but to force the repeal of the entire state act and again permit ASCAP to do business in the state rather than comply with the statutory regulations relating to pay for the individual copyright proprietors directly instead of through the combination declared unlawful?

(b) That the decision of the trial court holding the four sections (R. S. N. 1943, 59-1303-1306; br. apdx. 4-6) relating to individual composers invalid, subjected the music users of the State of Nebraska, including the petitioners, to confiscatory infringement suits; that the repeal of the entire Nebraska law would afford the only relief to Nebraska music users from such infringement suits; that threats of infringement suits and other unethical operations were then being used by ASCAP before the Nebraska legislature then in session to force the repeal of said state act; and that after judgments were entered in the cases at bar, the Nebraska legislature did repeal the state act on April 17, 1945, effective August 10, 1945?

V.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when the record showed the foregoing last mentioned facts in connection with the repeal of said statute, by holding that the repeal of said statute relieved the federal court of the duty to pass upon the validity of the state statute, when the State of Nebraska had a protective saving clause

statute in force at the time of the repeal specifically providing that no repeal of any statute by the legislature of Nebraska shall affect pending actions or causes of action in that state arising while the act was in force and effect and prior to repeal?

VI.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by affirming the judgments of the trial court assessing $250.00 for each infringement, when the National Copyright Act itself, by clear and unambiguous terms, provides $10.00 for each infringement of a musical composition as the statutory allowance?

VII.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when it affirmed the trial court's allowance of substantial attorney fees as part of the costs in each case, when it appeared that the issues actually tried in the court below by the respondents and the petitioners in all the cases were the constitutionality of the Nebraska statute and the applicability of the National Copyright Act upon new issues presented for the first time since the enactment of the National Copyright Act on March 4, 1909?

VIII.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when it, upon its own volition, adopted a construction, as shown by its

opinion, which would destroy rather than uphold the validity of the state act in all its parts?

IX.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when it permitted, in its power of appellate review, the destruction of a state statute, when it appeared that the staute was in no manner in conflict with the National Copyright Act?

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 764

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

REMICK MUSIC CORPORATION,
Respondent.

No. 765

PEONY PARK,
Petitioner,

v.

M. WITMARK & SONS,
Respondent.

No. 766

LLOYD G. FOX,
Petitioner,

v.

CHAPPELL & CO., INC.,
Respondent.

No. 767

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Nature of the Case

We may speak of the four cases here involved as one case since the issues are the same in all cases.

The Respondent is the owner of a copyrighted piece of music. It brought this action to restrain the defend-

ant from playing that music commercially without license or permit. In other words, the copyright owner here is seeking to protect the right of public performance for profit granted him by the United States Copyright Act of March 4, 1909, 35 Stat. L. 1075, 17 U. S. C. A. Sections 1, 5, 18 and 25.

The appellant seeks certiorari upon a very novel and startling theory. His real defense here and his main point upon which he seeks this writ is that the copyright proprietor of a musical composition, having sold and published his work, thereby loses his right of public performance for profit.

The appellant urged this as a defense in the District Court in an action for infringement of the right of public performance for profit and he urged it in the Circuit Court of Appeals. However, when he came to prepare his petition and writ here his courage apparently failed him. Instead of presenting the issues squarely and openly, he embarked upon a course of circumlocution, advancing five so-called "reasons" which skirted this main proposition and which if supported would lead to the ultimate result of depriving the copyright proprietor of his performing rights.

We urged that these performing rights are given to the copyright proprietor by the Copyright Act of 1909 as a vested and integral part of this copyright; that they cannot be taken away from him; that the sale and publication of the sheet music does not affect that performing right; and that indeed the exploitation of any of the rights given to the proprietor of a musical

composition does not affect the subsequent exploitation of any of the other rights reserved.

Petitioner's contentions as to why he should have free use of respondent's music

The Petitioner admits that he performed the Respondent's music commercially, that is, publicly for profit, in his hotel dining room (or dance hall or roller skating rink), and that he paid Respondent nothing for the privilege and had neither license nor permit to use the music commercially, but Petitioner contends that he was entitled to the free use of Respondent's music—

1. because (Petitioner asserts) by publication and sale of the composition in the form of sheet music the Respondent automatically conferred upon the purchaser the right to perform the composition publicly for profit; and

2. because the Respondent did not comply with a Nebraska Statute then in effect, Section 59-1303 et seq., Revised Statutes Nebraska 1943, which required a copyright owner, as a condition precedent to collecting anything for the commercial use of his music in Nebraska, to specify upon the musical composition, in whatever form it might be published or printed, the selling price thereof for public rendition for profit, and granted to any purchaser the right, upon the payment of such fee, to use the music commercially as many different times as he pleased, and in as many different ways as he pleased, including rendition by individuals, bands, orchestras, radio broadcasting stations, electrical tran-

scriptions and musical records. (This Act also required the copyright owner as a condition precedent to the selling or disposition of the composition in Nebraska to file with the Secretary of State a copy of the composition and pay a fee of 25c for each filing;) and

3. because the plaintiff had retained its membership in the American Society of Composers, and Publishers (outside of Nebraska), and therefore, since ASCAP had been barred from Nebraska as a price fixing combination of copyright owners, Respondent was so besmirched by membership therein as to be present in a court of equity with unclean hands.

Short answer to the first contention

As to the first point the Supreme Court of the United States has already said in four cases that the owner of a copyright has the right to publish and sell copies of the musical work, and the right publicly to perform the work for profit, and that the copyright owner may exercise either right or both as his interests may dictate. *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 75 L. Ed. 971, and *Jewell-LaSalle Realty Co., v. Buck*, 283 U. S. 202, 75 L. Ed. 978, *Herbert v. Shanley*, 242 U. S. 591, 61 L. Ed. 511, *John Church Co. v. Hilliard Hotel Co.*, 242 U. S. 591, 61 L. Ed. 511, and the federal courts for years have enforced the right of public performance for profit in favor of the copyright owner, notwithstanding publication of the composition in sheet music form. A few of the cases are—

Dance Halls

Irving Berlin, Inc. v. Daigle (C. C. A. 5, 1929, 31 F. (2) 832).	"You Forgot to Remember" "Yes, Sir, That's My Baby" "What Do I Care, What Do I Care, My Sweetie Turned Me Down"
Buck v. Milam, 32 F. (2) 622.	"Ramona" "The Sunrise"
Buck v. Crescent Gardens Operating Co., 28 F. Supp. 576.	"Christopher Columbus" "My Blue Heaven"
Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F. (2) 354 (C. C. A. 7, 1929).	"Mississippi Mud" "My Ohio Home" "Dream Kisses"
Buck v. Pettijohn, 34 F. Supp. 968.	"You Must Have Been A Beautiful Baby"
Buck v. Spanish Gables, 26 F. Supp. 36.	"Boo Hoo"
Buck v. Dacier, 26 Supp. 37.	"Sweet Sue" "It's A Sin To Tell A Lie"
Buck v. Russo, 25 F. Supp. 317.	"You're Laughing At Me" "Pennies From Heaven"

Moving Picture Theatres

Irving Berlin, Inc. v. Daigle (C. C. A. 5, 1929), 31 F. (2) 832).	"You Forgot to Remember" "Yes, Sir, She's My Baby"

Harms v. Cohen, 279 F. 276.	"Tulip Time"
Famous Music Corporation v. Melz, 28 F. Supp. 767.	"I'd Climb The Highest Mountain (If I knew I'd Find You)" "Deep Night" "Just One More Chance"
M. Witmark & Sons v. Calloway, 22 F. (2d) 412.	"Smilin' Through"
Buck v. Newsreel Inc., 25 F. Supp. 787.	"Moon At Sea" "Sweet Sue—Just You" "Happy Days Are Here Again" "Roses in December"
M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470, Aff'd, 2 F. (2) 1220 (C. C. A. 4, 1924).	"Kiss Me Again"

Radio

Jerome H. Remick & Co. v. American Automobile Accessories Co. (C. C. A. 6, 1925), 5 F. (2) 411 cert. denied 296 U. S. 556, 70 L. Ed. 409, 1925.	"Dreamy Melody"
M. Witmark & Sons v. L. Bamberger & Co., 291 Fed. 776.	"Mother Machree"
Jerome H. Remick & Co. v. General Electric Co., 4 F. (2) 160, Knox, J., On motion to dismiss final determination 16 F. (2) 829 (1926), Thatcher, J.	"Somebody's Wrong"

Society of Europeam S. A. A. C. v. New York Hotel Statler Co., 19 F. Supp. 1.	"As We Part"
Lutz v. Buck (C. C. A. 5, 1930), 40 F. (2) 501, cert. denied, 282 U. S. 880, 76 L. Ed. 776 (1930).	Opinion just says "Popular Music"

Tavern

Leo Feist v. Young (C. C. A. 7, 1943), 138 F. (2) 972.	"The Waltz You Saved For Me"

Short Answer to the Second Contention

As to the second proposition, it is sufficient to say that it is undisputed in the record that none of the copyright owners here involved were engaged in business in Nebraska at any time relevant to this controversy. Music was sold over the counter by locally owned music stores in Omaha. These music dealers purchased the music from Respondent or its agent in New York through the channels of interstate commerce. Nothing about such transactions brought the public performance rights to the musical composition into Nebraska. The trial court, in his opinion, carefully considered this point (see Record, pp. 27 and 28). The Circuit Court's opinion draws attention to the same point and concludes:

> "* * * none of the Nebraska music dealers by the purchases mentioned acquired the appellees' exclusive rights to publicly perform the music for profit * * *." (Record, p. 327.)

Obviously, what the music dealer did not have, he could not sell and, therefore, no purchaser in Nebraska acquired any public performance rights.

Petitioner is forced then to contend that the failure of the copyright owner to come into Nebraska and submit himself to the regulations of the Nebraska statute above referred to gave Petitioner the right to publicly perform the copyrighted composition. But since Respondent did no business in Nebraska, the only chance Petitioner has is to point to the music sold by independent local dealers and claim a basis for regulation because thereof. The trouble with this contention again is that it depends for its validity on the assumption that the public performance rights are in some manner affixed to the sheet music. This being a wrong assumption, Petitioner's whole argument is unsound.

Obviously, as the Circuit Court of Appeals said, Respondent had the right to sell or otherwise dispose of its compositions in this state, or not to do so, as it saw fit. If it did not choose to do so (as in this instance) then it is equally obvious that such election could not make the music available to Petitioner for free commercial use in this state. Therefore, it does not matter whether the Nebraska statute is a valid statute or an invalid statute; and the Circuit Court of Appeals so held.

Furthermore, as the Circuit Court of Appeals went on to say, this statute has been repealed, and there is no reason why this Court should concern itself with the validity or invalidity of a repealed statute.

Petitioner would like to leave the impression that the Nebraska statute is a defense to Respondent's infringement suit because Respondent did not file its musical composition under the provisions of the Nebraska statute. Such is not the case. The applicable section of the Nebraska statute reads as follows:

> "Price; failure to affix; effect. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit at the time and in the manner specified in this act, *then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition* may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state." (Sec. 59-1304 Revised Statutes of Nebraska, 1943) (Part of Sec. 2 of original Act.)

The "such person" intended to be protected is one who "purchased and paid for such copyrighted musical composition" but the record affirmatively establishes that no Petitioner had made such purchase. See Record, Peony Park case, page 287, Interstate Hotel Company of Nebraska, page 293, Lloyd G. Fox, page 294. The trial court found as follows:

> "That there is no evidence that any of the defendant proprietors in these cases purchased in Nebraska, or elsewhere, prior to the performances

herein found, each or any of the musical compositions involved in these cases, either in the form of sheet music or orchestrations." (Finding of Fact No. 157, Record, page 73.)

The proprietor of the establishment wherein the musical composition is publicly performed is liable for the performance and, if same constitutes an infringement, is liable to the penalty affixed thereto. (*Herbert v. Shanley,* supra, and *Buck v. Jewell-LaSalle Realty Co.,* supra.)

Petitioners, therefore, wholly fail to qualify themselves as persons entitled to assert a right to protection under the wording of the Nebraska statute, another reason why the validity or invalidity of the Nebraska statute is not involved.

Short Answer to the Third Point

As to the third point, it is undisputed in the record that when this Court held in *Marsh v. Buck,* 313 U. S. 406, 85 L. Ed. 1426, and *Watson v. Buck,* 313 U. S. 387, 85 L. Ed. 1416, that Nebraska (or Florida), had the right to bar price fixing combinations of copyright owners from the state if it wanted to, the American Society of Composers, Authors and Publishers ceased to do business in Nebraska and withdrew from the state.

Petitioner, by referring to ASCAP as "respondent's organization" (Petition, page 8), and by making statements such as "respondents, through their organization then known as the Music Publishers Protective Association (now ASCAP)" (Petition, page 11), and by other

references such as the charge of "monopolistic control" (Petition, page 20), seek to leave the impression that ASCAP and not Respondent is the real party in interest. This is not the fact. The trial court found that, previous to the infringements, ASCAP had assigned the public performance rights to Respondent and, of the resolution assigning such rights, specifically found:

> "* * * that said resolution, including the revesting and relinquishment therein professed, was not a subterfuge or simulation, but, though reluctant and compelled by law, was genuine and real and in good faith, and has consistently been honored by Ascap; that Ascap actually discontinued business in Nebraska promptly after the decision of the Supreme Court in Marsh v. Buck (supra) on May 26, 1941." (Record, page 33.)

The Findings of Fact on this point are in the Record at pages 71 and 72. Petitioner in no way challenged these Findings in the Circuit Court of Appeals and is, therefore, in no position to avoid the consequences of those Findings in his Petition for Writ of Certiorari.

That the Society continues to act as a licensing agent for Respondent in other states where its operations are not illegal is clearly of no concern to the State of Nebraska. And that Respondent continues to use the Society as a licensing agent in other states clearly does not bar this Respondent from enforcing in the Federal Courts of Nebraska, as an individual, his rights under the Copyright Act.

But beyond this, as pointed out by the Circuit Court of Appeals, a defendant who has admittedly been guilty of a wrongful appropriation of plaintiff's property is

in poor position to complain about the cleanliness of the hands of the plaintiff.

Analysis of the Five "Reasons" Advanced for the Writ of Certiorari

Having presented the real issues in this case, we now turn to the so-called "reasons" advanced by Petitioner and attempt to analyse them and answer them for this Court. (We do not consider them in the order set out by Petitioner.)

Petitioner's heading would have been more accurate if it had read "Five (or more) Misstatements Relied Upon to Attract the Attention of the Court." Counsel for Petitioner tries hard to bring the case within some of the reasons for granting certiorari referred to in Rule 38, but fails, as of necessity, he must.

Claim that this Court, and other Federal Courts, have never had the true text of Section 1 before them.

Counsel first would have the Court believe that never since the passage of the present Copyright Act in 1909 has this Court ever had before it the true text of Section 1 of the Act. He does not contend that this Court did not have before it for construction and enforcement, both in the Shanley case and the Jewell-La-Salle case, Section 1 of the Act, and particularly subsection (e) of Section 1 dealing with the right of public performance for profit. His contention presupposes that Mr. Justice Holmes, in the Shanley case, and Mr. Jus-

tice Brandeis, in the Jewell-LaSalle case, both wrote their opinions without reading Section 1(e) in full.

He asserts that, over all the years, the Federal Courts have been upholding the copyright owner's right of public performance for profit notwithstanding printing and vending in the form of sheet music, because they have erroneously been following two cases where the judge got mixed up on punctuation, namely *Hubbell vs. Royal Pastime Amusement Co.*, 242 Fed. 1002, and *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470.

He says that in the Hubbell case the trial judge inserted a semicolon after the words "musical composition" in Section 1(e), and that the Witmark case was decided by the court under the impression that there was a period at the same point.

Counsel never shows us how the presence or absence of the semicolon or period would have made the slightest difference so far as the question as to whether or not the exercise of the right to print and publish in the form of sheet music waives the right of public performance for profit is concerned. But he asserts that all of the subsequent cases have followed the Hubbell and Witmark cases and hence, having all been based upon the original misconception or misconceptions of the trial judges in those cases, have all been incorrectly decided.

This assumption is wrong so far as the Hubbell case is concerned for the following reasons:

First, Herbert v. Shanley, 242 U. S. 591, 61 L. Ed. 511, wherein the right of public performance for profit was recognized as a right separate and distinct and in

addition to the right to print and vend, was decided four months prior to the Hubbell case.

Second, The Hubbell case has never been cited by any Federal or State Court from the date of its rendition down to the time that it was referred to in Judge Delehant's decision in the instant case. See *Shepherd's Federal Reporter Citations 1938,* column one, page 1297, and the July 1946 Supplement.

Third, Section 1(e) has never been quoted by the court in any case with a semicolon following the words "musical composition."

Fourth, in *Jewell-LaSalle Realty Co. v. Buck,* 283 U. S. 202, 75 L. Ed. 978, and *Buck v. Jewell-LaSalle Realty Co.,* 283 U. S. 191, 75 L. Ed. 971, where it was specifically held that:

> "The copyright act confers two monopolies—that of making copies and that of giving public performance for profit,"

the Hubbell case was not even mentioned.

Nor has the Witmark case had any misleading effect upon subsequent decisions. The reasons why it has not are as follows:

First, Counsel's statement that the trial court decided the case upon the theory that Section 1(e) ends with the words "Musical composition" is not true. The full text of Section 1(e), in so far as it is material here, appears in the opinion of that court at the end of the first paragraph at the top of page 476 in 298 Federal. There was in the case the question as to whether or not merely playing the chorus of the copyrighted work

constituted an infringement of the right of public performance for profit. Counsel was contending that (a) because the original draft of the Act read:

> "The copyright secured by this act shall include the sale and exclusive right to publicly perform a copyrighted musical work *or any part thereof*,"

and (b) because the italicized words had been dropped, and (c) because the law had finally emerged in its present form as follows (quoting it just as counsel quoted it in his brief):

> "That any person entitled thereto * * * shall have the exclusive right * * * to perform the copyrighted work publicly for profit if it be a musical composition,"

the playing of only the chorus did not constitute an infringement of the work. Obviously, counsel in that case did not need to quote the subsection in full in order to make his point. And obviously this was entirely plain to the court when it said in the opinion that in order to set out plainly and clearly the position of counsel for the defendant it would quote from his brief. There is not the slightest justification for saying, as counsel for Petitioner in this case says, that the court in the Witmark case inserted a period after the words "musical composition," and that all of the courts since that time have failed to read the section as set out in the statutes and have erroneously assumed that in the statute the words "musical composition" are followed by a period, from which assumption they have passed to the assumption that printing and vending does not waive the right of public performance for profit.

Counsel for Petitioner even goes so far as to say, on page 16 of his petition, that the district judge in rendering his opinion

> "stated that he was copying the copyright statute from the defendant's brief, along with other matters."

This is not what the court said, as counsel must know. What the trial court really said was (page 477):

> "In order that this new view of the question may be clearly understood, I shall state it in counsel's own language, which is as follows:"

Then follows, in the quoted language, the abbreviated version of Section 1(e) which counsel for defendant in that case had set out in his brief, and which counsel for Petitioner in this case now reproduces on page 16 of his petition.

There was indeed in that case a question as to whether or not there had been a public performance for profit. The question was decided adversely to the defendant on the authority of Herbert v. Shanley and Church v. Hilliard, and in this connection we may note that the Supreme Court in those cases was not influenced by the Witmark case either since that decision came later.

Therefore the assertion that all subsequent cases where the right of public performance for profit has been enforced have been based upon a misconception of the law originating in the Hubbell and Witmark cases is, we submit, an assertion made for the purpose of catching the eye of this Court, and not in good faith nor in

the belief that the whole course of decision has been influenced by original error in these cases.

As to this contention the Circuit Court of Appeals in the instant case said:

> "We have examined the cases upon which appellants rely for the development of this argument. We think it sufficient to say that we find nothing in them tending to support appellants' contention." (Record, page 323.)

We see no reason why the time of this Court should be taken up in duplicating this examination.

Claim that there is a conflict between Circuits.

The next attempt on the part of counsel to bring himself within the pattern of Rule 38 is the charge that there is a conflict between the decisions of the Second, Fourth and Eighth Circuits. He is not very clear as to what the conflict is. As near as we can make it out his claim is that the lower courts in the Shanley and Hilliard cases held that when a copyright proprietor sells printed copies of his composition to the public the public performance rights go along with the music for the price of the sheet music itself, and that this is in conflict with the decision of the Eighth Circuit in this case and the Fourth Circuit in the Witmark case. That neither of these decisions so held was demonstrated by the Circuit Court of Appeals opinion in the instant case (Record, bottom page 321), but if they did so hold the holding was reversed when the cases got to this Court since, as pointed out by both Judge Riddick and Judge

Delehant, there would have been no occasion to pass upon the question of whether the performance was for profit in the Shanley and Hilliard cases if the public performing rights had gone to the defendant along with his purchase of the sheet music. So there is no conflict between the Eighth Circuit and the Second Circuit, because the Supreme Court of the United States itself has already held that the construction placed upon the Act by the Eighth Circuit is correct.

And there is no conflict between the Second Circuit and the Fourth Circuit. The Witmark case followed the Supreme Court decision in the alleged conflicting cases that went up from the Second Circuit. So there aren't any conflicts between the Circuits to be resolved in this case. This is just another device produced in the hope that in a hurried reading of the petition and supporting brief the Supreme Court will grant certiorari without examining the decisions.

Claim that the question as to whether publication and sale frees public performance rights has never been settled by this Court.

Petitioner invites the consideration of this case by this Court on the theory that the question as to whether or not printing and selling over the counter constitutes an abandonment of public performance rights has never had the attention of this Court.

In *Church v. Hilliard* it was stated at page 322 of the decision of the Circuit Court of Appeals, 221 Fed. 229, that:

> "When the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them."

Is it to be supposed that Mr. Justice Holmes overlooked that statement by the Circuit Court of Appeals when he wrote the decision of this Court on appeal?

Similarly it appears from the opinion of the Circuit Court of Appeals in the Shanley case, at page 342 (229 Fed. 340), that it was the contention of the defendant that by virtue of its purchase of a song published and sold by the plaintiff the defendant was authorized to perform it in a restaurant. If the selling of sheet music constitutes an abandonment of public performance rights, then it was immaterial in that case whether the performance was for profit or not. Is it to be supposed that Mr. Justice Holmes overlooked this point when he decided that the performance in question was in fact a public performance for profit and therefore in violation of Section 1(e)?

And is it to be supposed that this Court completely overlooked the question a second time in the Jewell-La-Salle case when Mr. Justice Brandeis made it so clear that the right to print and vend is one thing, and the right to perform publicly for profit is another, that the two rights exist simultaneously, and that each or both may be exercised as the best interests of the copyright owner dictated?

Has counsel brought to the attention of this Court anything at all that would incline this Court to believe that Congress may have intended that the copyright

owner could have either of the two rights, but not both? Counsel boldly asserts that such is the case. And he invites this Court to examine the appendix of his brief in the Circuit Court of Appeals where he says there will be found Congressional Report No. 2222, submitting the Act of March 4, 1909, and a description of the copyright laws passed by Congress from 1793 to date, prepared by counsel for Petitioner. But never anywhere in his brief does he point to any language, either in the Committee Report or in any previous Copyright Acts, which would in the slightest degree lead to the conclusion that both of these rights could not exist simultaneously. Nor does he have anything to say about that part of this same Section 1(e) where records are freed from royalty except with respect to performance rights. ("The payment of the royalty provided by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright *except in case of public performance for profit.*") Nor does he ever refer to the damage section (Section 25), where performing rights are expressly protected against infringement.

He invites attention to his digest of prior copyright laws set out in the appendix of his Circuit Court brief, but does not tell this Court what it may expect to find by such an examination. This is simply a device to lead the Court to believe that there is something in the prior copyright acts that would warrant an inference that public performance rights did not exist as a thing separate and apart from the other rights pertaining to the copyright prior to the enactment of the 1909 statute.

Such an examination would not show anything of the sort. Originally the copyright statutes protected an author with respect to copying or publication of his work. The works protected were also limited. Over the years there was an enlargement in the kinds of work protected and there was an enlargement in the rights protected. For example, the Act of 1856 for the first time provided that the author of a dramatic work should not only have the right to multiply it in copies for sale but the sole right to perform the same. (See "The Statutes at Large and Treaties of the United States of America, from Dec. 3, 1855 to March 3, 1859, edited by George Minot and George P. Sanger" Vol. II Boston 1859, pp. 138-139.)

It was in 1897, not 1909, that Congress for the first time gave the copyright owner the exclusive right of public performance of his musical composition. The first two sentences of the Act read as follows:

> "Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic, or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. If the unlawful performance and representation be wilful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year."

This right was stronger than the right of public performance *for profit* as the proprietor's right was violated by a performance anywhere in public, no matter what the circumstances, and whether or not a profit ensued.

The 1909 Act was both a new copyright act and a consolidation of all previous copyright acts. (See *Witmark v. Standard,* 221 Fed. 376.) It very clearly gives to the copyright owner the exclusive right to perform his musical compositions publicly for profit. It, of course, also gives him the right to print, publish and vend it in the form of sheet music or orchestration.

Counsel does not have the temerity to assert flatly that the right of public performance for profit, as a thing separate and apart from the right to sell in the form of sheet music and capable of being exercised simultaneously with the latter right, did not exist under prior acts, but he would lead the Court to believe that an examination of prior acts would show that this right of public performance for profit was something unknown prior to 1909.

On page 25 of his petition, and elsewhere therein, counsel gives the impression that the Copyright Act was passed for the benefit of those who use music commercially, such as his dance hall, hotel and skating rink clients. Congress never had any such intention. Congress wanted to preserve the exclusive monopoly to the creator of the music. That has been its policy throughout and the reason for it is that the preservation of the monopoly encourages the creator and eventually benefits the public at large. This was discussed at an early date in *Grant*

v. Raymond, 6 Pet. 218, 8 L. Ed. 376, where this Court said that the grant of a copyright or patent is a contract under which the government says, in effect, to the author or inventor "if you will disclose your writing or discovery to the public I shall give you, for a limited time, the exclusive right to exploit it for profit; upon the expiration of the limited period, however, the work shall belong to the public forever."

The play on "All rights reserved, including public performance for profit."

Counsel's next effort to intrigue the court is the presentation of the idea that the decision of the Circuit Court of Appeals is based, in part at least, upon the erroneous presumption that the presence of the words "All Rights Reserved, Including Public Performance for Profit," on the sheet music, enlarged the rights conferred by the Copyright Act. The Circuit Court of Appeals made no reference whatsoever to this subject in its opinion, notwithstanding Petitioner's statement that:

> "Certiorari should be allowed because the trial court found, *and the Circuit Court of Appeals affirmed,* the proposition advanced by respondents that certain wording placed on the reproduced copies for sale gave notice to the purchaser that the public performance rights were reserved." (Pet. for cert. p. 26.)

Unquestionably this legend did convey that information, but the Circuit Court of Appeals didn't find it necessary to base its decision either in whole or in part upon that proposition. However, counsel pretends that the question is in the case and this gives him an opportunity to

talk about decisions like *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, and *Bobbs-Merrill Publishing Co. v. Straus*, 210 U. S. 339. But this line of cases was distinguished in *Buck v. Jewell-LaSalle*, 283 U. S. 191, 75 L. Ed. 971, 975, where the court said:

> "The argument here urged, however, is that since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies (including records) and that of giving public performance for profit including mechanical performances from a record); and that a monopoly of the reception for commercial purposes, of this same rendition is not warranted by the act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare Bobbs-Merrill Co. v. Straus, 210 U. S. 330, 52 L. Ed. 1086, 28 S. Ct. 722. This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the act, but a monopoly is expressly granted of all public performance for profit."

Other attempts to rely upon this same theory in musical copyright cases have met with no success. See *Irving Berlin, Inc. v. Russo, et al* (5th C. C. A.), 31 F. (2) 832, and *Famous Music Corporation v. Melz* (D. C. Western Dist. La. 1939), 28 F. Supp. 767.

In *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 61 L. Ed. 866, there was a similar dissimilarity in that there the effort was to control the price at which the patented machine might be sold after the manufacturer had been paid therefor, by attaching to the machine

a notice to the effect that it might not be delivered to any member of the public until "the full license price" stated in the notice had been paid. The court said that this was just a device to control the price of the patented machine on resale after it had passed into the hands of the dealer. Cases of this character obviously have no application.

Effort to have court review question as to whether respondents engaged in business in Nebraska.

Departing from the pattern of Rule 38 counsel would have this court review the question of whether or not respondents engaged in business in Nebraska. Counsel did not ask for a review of this question in the Circuit Court of appeals (Record p. 95 et seq.) and is not in position to do so here.

The trial court found (Record page 72, Finding 152):

> "That no corporate plaintiff is incorporated (fol. 118) or has, at any material time, done or transacted any business in Nebraska, or sold in or into Nebraska, either directly or indirectly, by domestic sale, or otherwise than through the channels of interstate commerce, any published sheet music or orchestral arrangements."

The Trial Court also found (Record page 72, Finding 153):

> "That, at all material times, music dealers in Nebraska have purchased and received through the channels of interstate commerce from the several plaintiffs, either immediately or through their selling agent or agents, published sheet music and orchestral arrangements of their respective copyright-

> ed musical compositions, obviously for the purpose of resale by such dealers in Nebraska, but on their own account to their local trade; * * * ."

No error was assigned with reference to any of these Findings on appeal. Counsel is in no position to ask this court to review the question now. There is a presumption that the Findings of the trial court are correct. This court is certainly not going to grant certiorari for the purpose of reviewing the question of whether or not respondents engaged in business in Nebraska where the trial court found that they did not and petitioner did not even contest the point on appeal. (See Record page 95 and appellant's brief.) As a matter of fact, petitioner claims in this very application that respondents boycotted Nebraska on all commercially usable music (Petition page 8).

Attempt to inject a monopoly issue into the case.

At the bottom of page 19 of his petition counsel asks for the consideration of this case by this court:

> "to the end that this vast control now exercised by the respondents may be declared as unlawful."

Counsel points to no place in the record to the effect that these four Respondents have any "vast control" over anything. In other places in his petition and brief he talks as though these particular Respondents have and had a monopoly on the performing rights of all copyrighted music. At the top of page 25 of his petition he himself says that there are 369 music publishers in the country. We have here four, and only four, individual copyright owners who are simply suing under

the Copyright Act to prevent these Petitioners from pirating the music individually owned by them. The trial court found and stated:

> "That no combination, such as is described in Section 59-1302, Revised Statutes of Nebraska 1943, is involved in these cases, and each case is conducted by the plaintiff, individual copyright proprietor, in its own name and behalf and solely for its own benefit." (Record, page 71, Finding 147.)

This Finding was not contested by Petitioners in their appeal to the United States Circuit Court of Appeals (Record, page 95), and the effort to inject a monopoly issue here is obviously made for the purpose of creating the impression that the suppression of a monopoly is here involved which should have the attention of this court.

To this same end counsel represents to the court, at page 20 of his petition, that the Respondents in this case in and of themselves constitute a group of publishing houses that exercise a monopolistic control. Judge Delehant disposed of this contention adversely to the Petitioners (see Record, pages 35, 36). See also Finding No. 147, Record page 71, to the effect:

> "That no combination, such as is described in Section 59-1302, Revised Statutes of Nebraska 1943, is involved in these cases, and each case is conducted by the plaintiff, individual copyright proprietor, in its own name and behalf and solely for its own benefit."

See also Conclusion of Law XLV, Record, page 79, 80, as follows:

> "That each of said plaintiffs has a large number of copyrighted musical compositions in its own-

> ership and under its control does not operate to bring the plaintiffs, or any of them within the definition and contention of Section 59-1302 Revised Statutes of Nebraska 1943."

As indicated above, this Finding was not assigned as a point relied upon for reversal.

Effort to convince the Court that "protection" of music users is here involved.

Counsel seeks to convince this court that this is a case for certiorari by stating that:

> "The protection that the music users of America have under the National Copyright Act would be destroyed, and by court decision no state law could effectively be passed to protect its citizens, if the Eighth Circuit Court's opinion is allowed to stand." (Petition, page 25.)

Counsel cites neither evidence nor decisions to support this statement. Presumably the "protection" that he refers to is such "protection," under his theory, as would permit music users to perform gratis copyrighted music publicly for profit if the copyright owner undertook to sell his composition in sheet music form. Presumably a state law which counsel would consider effective to protect its citizens would be a law requiring copyright owners, in order to protect their public performance rights within the state, to do something more than is required of them by the National Copyright Act, on penalty of loss of those performance rights through failure to comply with the state statute.

At page 25 of his petition counsel, still trying to say something that will make the court think that such

unusual circumstances exist as would justify the issuance of the writ, says that:

> "An unlimited and uncontrolled price must be paid to respondents by all who must have music renditions commercially on their premises, or go out of business."

Since, on counsel's own statement, there are some 365 other music publishers it is quite probable that music users will be able to get along even though the four copyright owners here involved in these cases might insist on license fees which the Petitioners and other music users could not profitably pay. There is no evidence whatsoever that these Respondents have ever exacted or sought to exact any such price.

Conclusion

Having examined all of the reasons asserted by Petitioner as to why certiorari should be granted in this case, we find that none of them come within the pattern of Rule 38, and that none of them presents any unusual or extraordinary question of law or fact that should have the attention of this court. We find that we have here involved only that kind of case which any copyright owner must bring where some commercial user of music attempts to perform publicly for profit and without license or permit the work of the copyright owner. Each Petitioner admits that he performed the music commercially without license or permit from the copyright owner, but asserts that he had a right to the free use of the music because the copyright owner had not complied with certain provisions of the Nebraska statute.

The Circuit Court of Appeals found that since Respondents had not undertaken to engage in business in Nebraska the fact that they had not elected to subject themselves to the regulations of the Nebraska statute did not justify Nebraska music users in pirating their music. In this state of the record there is nothing for this court to consider, and obviously, it does not matter whether the Nebraska statute was valid or invalid. And certainly this court should not be asked to consider the question as to whether this statute would have been effective had the Respondents elected to come within the state, a question which is now, in view of the repeal of the statute, moot.

Misstatements Relied Upon By Counsel to Capture the Interest of the Court.

We feel that this petition for issuance of writ of certiorari is not a good faith application. The reason we think so is that counsel has found it necessary or expedient to make so many misstatements. He has erroneously told this court:

1. That the correct text of Section 1(e) of the Copyright Act of 1909 has never been examined by this Court;

2. That the erroneous insertion of a semicolon in the text of the Act by the trial judge in the Hubbell case, and a period by the trial judge in the Witmark case, has changed the whole course of decision;

3. That his claim that the exercise of the right to print and vend waives the right of public performance for profit has never heretofore been considered in any court;

4. That there is a conflict between the Second, Fourth and Eighth Circuits as to how Section 1(e) should be interpreted;

5. That the Copyright Act contains language to the effect that publication in sheet music form waives the right of public performance for profit;

6. That the Committee Report at the time the 1909 Act was passed shows that Congress intended that such should be the case;

7. That both the trial court and the Circuit Court of Appeals enlarged the rights granted by Section 1 by resorting to the printed statement:

> "All Rights Reserved, Including Public Performance for Profit";

8. That there is a line of Federal authorities condemning reservations of this sort;

9. That Section 41 of the Copyright Act:

> "was cited by the trial court and affirmed by the Circuit Court in the cases at bar as a statute conferring the right to withhold or restrict the use or price of the copyrighted material after sale,"

when, as a matter of fact, the right to withhold or restrict the use or price of copyrighted material after sale is not involved in this case, and neither the district court nor the Circuit Court of Appeals referred to Section 41 (Petition, page 28).

10. That this court, in *Marsh v. Buck,* 313 U. S. 406, and *Watson v. Buck,* 313 U. S. 387, declared valid the entire Nebraska Act, when, as counsel well knows, the Circuit Court of Appeals found it unnecessary to inquire into the validity of the Nebraska Act, and when, as counsel also well knows, the futility of such a claim was thoroughly demonstrated both by the trial judge (Record page 38), and the author of the Circuit Court of Appeals opinion (Record, bottom page 325).

11. That the decision of the trial court

> "opened the way for an avalanche of additional infringement suits against Nebraska users including petitioners which would have been confiscatory of their respective businesses. Accordingly the state legislature repealed the act."

wher counsel well knows that there has not been one single infringement suit in this jurisdiction since Judge Delehant's decision, and when counsel, in the nature of things, cannot know what moved the State Legislature to repeal the Act;

12. That counsel had no opportunity to explain to the Circuit Court of Appeals that error had been committed in stating that:

> "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."

when such "opportunity" existed in the form of a motion for rehearing and no such motion was filed;

13. That:

> "It will be seen that the law now reads in accordance with the decision above quoted: '(e) To

> perform the copyrighted work publicly for profit if it be a musical composition;'" (Petition, page 15.)

when neither in the Statutes at Large, nor in U. S. C. A., nor in any decision, has Section 1(e) ever been printed and published with a semicolon following the word "composition";

14. That the trial judge in Witmark & Sons v. Pastime Amusement Company:

> "In rendering his opinion, stated that he was copying the copyright statute from the defendant's brief, along with other matters. The judge said he so copied in order that there could be no doubt about the language." (Petition, page 16.)

when the actual language of the judge was:

> "In order that this new view of the question may be clearly understood (that the dropping out of the words "or any part thereof" indicated an intention that the chorus could be played with impunity), I shall state it in counsel's own language which is as follows:" (298 Fed. 470, 477.)

15. That the Eighth Circuit in the instant case "copied for the first time in the history of the copyright litigation on this subject the exact wording of the Statute, but the court supported its opinion with the South Carolina decision" (Witmark & Sons v. Pastime Amusement Co.), (Petitioner, page 19), when the exact wording of the statute was in fact set out in this very Witmark case, and when the decision of the Eighth Circuit in this case was based, not upon the holding in the Witmark case, but upon the holding of this court in the Jewell-LaSalle case, the Shanley case, and *Fox Film Corporation v. Royal*, 286 U. S. 123, 127.

Each and every one of the above statements is untrue. A petition based upon misrepresentations of the record and the state of the law can hardly merit the consideration of this court. It is not probable that a salesman who seeks entrance to the premises through misrepresentation will have anything of merit to sell once he has been admitted.

Respectfully submitted,

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Attorneys for Respondents.

The undersigned attorney for Petitioners in the above entitled cases does hereby acknowledge receipt of copy of the above and foregoing Brief in Opposition to the Petition for a Writ of Certiorari herein, said service having been made upon the undersigned at Omaha, Nebraska, this _____ day of December, 1946.

_____

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946

No. 764
INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,
v.
REMICK MUSIC CORPORATION,
Respondent.

No. 765
PEONY PARK,
Petitioner,
v.
M. WITMARK & SONS,
Respondent.

No. 766
LLOYD G. FOX,
Petitioner,
v.
CHAPPELL & CO., INC.,
Respondent.

No. 767
INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,
v.
JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

MOTION FOR REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH SUPPORTING CASES.

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I. Under the ruling of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, based on Sec. 725 U. S. C., and similar cases since decided, does not a saving clause statute in force in Nebraska, continuing all rights existing prior to repeal of the state statute, bind the federal appellate courts when considering the validity of the nullification of the state law? 2

II. Should not the petition for certiorari heretofore filed, be allowed, when it now appears from the record before the Supreme Court of the United States that a state statute was in full force and effect and was nullified by the United States District Court and affirmed by the United States Circuit Court of Appeals? Or should not Sec. 374(b) of the United States Code which provides for review in the event state laws are nullified by federal courts be now followed by the Supreme Court? 5

III. Was there a violation of the last sentence of the United States Code, Sec. 216, in the cases at bar, which nullified the decision of the United States Circuit Court of Appeals for the Eighth Circuit, because that Court was improperly constituted? If so, should not an order of this Court be entered remanding these causes to the said Circuit Court for a hearing and final decision before a properly constituted Circuit Court? 7

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MOTION FOR REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH SUPPORTING CASES.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Statement of the Present Status of the Cases

1. The petition for the writ of certiorari on file presented among other things the validity of two sections

of a Nebraska state protective and regulatory act in reference to the public performance of copyrighted musical compositions. These sections were nullified by the federal courts below as violative of the federal Constitution and the National Copyright Act.

2. The petition for certiorari was filed on December 9, 1946. Certiorari was denied on January 20, 1947. Rehearing and a reconsideration based on the three points following are now requested.

I.

Under the ruling of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, based on Sec. 725 U. S. C., and similar cases since decided, does not a saving clause statute in force in Nebraska, continuing all rights existing prior to repeal of the state statute, bind the federal appellate courts when considering the validity of the nullification of the state law?

1. Sec. 49-301, Revised Statutes of Nebraska for 1943, passed in 1913, was in full force and effect when the two sections of the state statute herein in question were declared invalid by the federal trial court. The statute was repealed before the case reached the Circuit Court. The Nebraska saving clause is as follows:

> "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

2. The petitioners therefore maintain that the United States Circuit Court of Appeals for the Eighth Circuit erred when it held (R. 328):

"• • • • 'A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law.' Ziffrin, Inc., v. United States, 318 U. S. 73, 78, 63 S. Ct. 465, 469, 87 L. Ed. 621; Carpenter v. Wabash Railway Co. et al., 309 U. S. 23, 26, 27, 60 S. Ct. 416, 84 L. Ed. 454; Texas Co. v. Brown et al., 258 U. S. 466, 474, 42 S. Ct. 375, 66 L. Ed. 721; Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 541, 542, 61 S. Ct. 347, 85 L. Ed. 327; Hines v. Davidowitz, 312 U. S. 52, 60, 61 S. Ct. 399, 85 L. Ed. 581; Standard Oil Co. of Kansas et al. v. Angle et al., 5 Cir., 128 F. 2d 728, 730."

3. The question arises in the following manner: Infringement cases were brought by the respondents herein, as copyright proprietors, against the petitioners, who were music users in Nebraska. The respondents in the trial court were required by the trial court to state whether or not they had complied with the two sections of the Nebraska statute in question, which sections required the copyright proprietor to collect his public performance rights at the time the copyrighted musical compositions were sold in the state. The respondents, among other things, stated they did not comply with the sections because as a state statute it was unconstitutional under the federal Constitution and in violation of the National Copyright Act (R. 8-9).

4. The United States District Judge, in nullifying the sections of the state act, said in the opinion that he would follow the previous ruling on the same sections of the statute previously nullified in *Buck v. Swanson*, 33 F. Supp. 377, 387-8, by a three-judge federal court. The said trial court in the cases at bar accordingly said:

"* * * And since that court's view of the invalidity of that portion of the statute was so clearly expressed, it is now repeated and adopted. * * *" See opinion R. 40 to 42.

5. In the conclusions of law the trial court, in nullifying these two sections of the state statute, said (R. 80):

"XLVII—That Section 59-1303 Revised Statutes of Nebraska 1943, is a plain negation and frustration of the Federal Copyright Act and is unconstitutional, violating the due process and equal protection clauses of the Constitution and violative of the Copyright Act and constitutes an attempt to deprive the Federal Courts of jurisdiction in suits under Title 17 U. S. C. A. Section 34 and Title 28, U. S. C. A. Sec. 41 (1)(7) and, for these and other reasons, is null and void.

"XLVIII—That the failure of plaintiffs to comply with Section 59-1303 Revised Statutes of Nebraska 1943, is a right of plaintiffs since that section is void."

6. On appeal the United States Circuit Court of Appeals for the Eighth Circuit, on October 23, 1946 (157 F. 2d 744), upheld and affirmed the decision of the trial court below in the nullification of the state law, and added the above-quoted language from the opinion that a change in the law between a nisi prius and appellate court required the appellate court to apply the changed law. The Nebraska law was repealed after the judgments herein were entered. Thus an apparent error appears in these proceedings. Attention is again called in this motion for rehearing to that error, because if the state law was in force and was the *gravamen* of the petitioners' defense, then its nullification by a federal court gave petitioners the right to be heard in the Supreme Court of the United

States. The saving clause in the Nebraska state statute was overlooked by the Circuit Court, as was the decision of the Supreme Court of Nebraska in reference to the application of the saving clause, as will be seen in *Helfrich v. Baxter*, 128 Neb. 281, 258 N. W. 532.

7. It would seem, therefore, that the Supreme Court should reconsider for the purpose of this petition for rehearing that the sections of the state law were in full force and effect for the purpose of review when the law was nullified and the judgments entered in order to give full effect to the following points relied upon for relief on rehearing.

II.

Should not the petition for certiorari heretofore filed, be allowed, when it now appears from the record before the Supreme Court of the United States that a state statute was in full force and effect and was nullified by the United States District Court and affirmed by the United States Circuit Court of Appeals? Or should not Sec. 347(b) of the United States Code which provides for review in the event state laws are nullified by federal courts be now followed by the Supreme Court?

1. The entire Sec. 347 of the United States Code, being Judicial Code Sec. 240, amended, petitioners submit, should be by the Court now reconsidered in view of its explicit provisions for review confined to the federal question obviously before the Court. It was clearly stated in the petition for writ of certiorari heretofore before the Court, from pages 10 and 11 thereof, that the nullification of a state statute was made and set forth as grounds for granting the writ. The language copied from the petition is as follows:

"• • • When the pertinent section of the Nebraska act was declared unconstitutional and nullified by a single federal judge and when the United States Circuit Judge who had previously nullified the same section and passed upon the question in the case, petitioners believe this Court should allow certiorari rather than remand the cases on the point.

2. Petitioners submit that Sec. 347(b), U. S. C., gives a right to them to have those sections of the state statute that were nulified by the federal court below, reviewed by the Supreme Court of the United States. The state law was in force at the time of hearing and entry of the judgments as above explained. The state saving clause kept the statute in full force. The federal trial court nullified the state act. The federal Circuit Court held that that the repeal of the state law in question pending appeal was the law of the case. The Circuit Court erred.

3. In the event a review is allowed by this Court on this point under this application for rehearing and a reconsideration of the petition heretofore filed, the review no doubt would be restricted to an examination and decision of the federal questions presented in the cases, as provided by the above-quoted federal statute.

4. Be that as it may, the state statute was in force under the Nebraska law and it was nullified by the Circuit Court. This result becomes now important because the petition for certiorari was denied, and this point of law should be given full effect in accordance with the Statute U. S. C. 347(b).

III.

Was there a violation of the last sentence of the United States Code, Sec. 216, in the cases at bar, which nullified the decision of the United States Circuit Court of Appeals for the Eighth Circuit, because that Court was improperly constituted? If so, should not an order of this Court be entered remanding these causes to the said Circuit Court for a hearing and final decision before a properly constituted Circuit Court?

1. This is a jurisdictional question. In the petition for certiorari the only reference to the point is set forth on pages 10 and 11 thereof. The point was not fully presented; and being jurisdictional, it may now be fully presented.

Sec. 216, U. S. C., Judicial Code Sec. 120, reads as follows:

> " * * * No judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals."

2. That section was passed many years ago because "the purpose of the provision is to make certain that the court shall be constituted of Judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance."

3. Because of the nature of these proceedings and the manner in which the question of the validity of these sections of the state statute in question has been brought before the federal court and nullified, petitioners submit they are entitled to the redress provided by law, i. e., to

have their causes reviewed by a properly constituted United States Circuit Court of Appeals. That right is petitioners' whenever it appears that a circuit judge was disqualified to sit because of his sitting in the district court on the same question and for all intents and purposes in the same cause. Those are the facts of record.

4. A brief historical sketch reviewing the record before the Court will illustrate petitioners' point.

5. The act in question was passed by the Nebraska legislature in 1937. The entire statute is found in the Revised Statutes of Nebraska 1943, Chapter 59, Article 13, and is appended in the appellants' (petitioners') brief in the Circuit Court. Copies of that brief were made available for the Supreme Court because it contained in the appendix the act in question and other data.

6. The American Society of Composers, Authors and Publishers, as shown by the records and files herein, is made up of the respondents in the cases at bar and other publishers and composers as its members. An action in 1937 was brought by the president of ASCAP for the Society and all its members, both composers and publishers, in the United States District Court in Nebraska. The suit was brought in equity to nullify the state act. The respondents in these cases at bar were such members who were thus plaintiffs in that action (*Buck v. Swanson,* 33 F. Supp. 377. *Marsh v. Buck,* Oct. term 1940; record on file in this Court, Vols. I and II, No. 312). The caption and address to the Court so shows. The defendant in that case was the State of Nebraska. The objective of that case was to nullify the law in all its parts, including the two sections herein in question, because in violation

of the National Copyright Act and the federal Constitution.

7. The state was made the party defendant through the governor and attorney general, as the representative of the citizens. They had no personal interest for the state in the matter. The state as such uses no music and is not interested in public performance for profit of copyrighted music, except as the public welfare was concerned and the police power of the state was protected. That action sought to restrain the enforcement because the act in all its parts was violative of the National Copyright Act and the federal Constitution.

8. Consequently a three-judge federal court was called together for the hearing. One United States Circuit Judge was called to sit with two United States District Judges. The opinion nullifying the two sections herein in question was written by that Circuit Judge and is found in 33 F. Supp. 377.

9. Thus the respondent music publishing houses herein were before those judges in that case. They were seeking particularly the nullification of the two sections of the Nebraska statute that related to themselves as music publishers and did so. The Circuit Judge acting in that case with the two District Judges, nullified the entire Nebraska statute upon the ground that the two sections now in question were in violation of the National Copyright Act and the federal Constitution. This plainly appears from the opinion in 33 F. Supp. 377, and the findings, conclusions, and decree therein. That case was appealed directly to the Supreme Court of the United States

as permitted by statute. Therefore, no parts of it were reviewed in the United States Circuit Court of Appeals.

10. The Supreme Court of the United States upon hearing reversed and dismissed the case. In so doing, the Court stated that the ASCAP organization, specifically calling it by that name, fell squarely within the purview of the act, and held that portion of the act a valid exercise of the state's police power. It did not specifically reverse the lower court's opinion on the invalidity of the two sections. The procedure was as follows:

12. The Supreme Court of the United States held as follows (*Watson v. Buck,* 313 U. S. 387, 405) after holding the monopoly section valid:

> " * * * All other questions remain open for consideration and disposition in appropriate proceedings."

The Court also held in *Marsh v. Buck,* 313 U. S. 406, 408:

> " * * * That part of the statute on which the court did not pass—and the part which the Attorney General said he stood willing to enforce if violated—set up a complete scheme for the regulation of combinations controlling performing rights in copyright music."

12. The contention of the respondents in its opposition to the petition for certiorari was that the Supreme Court did not pass upon the two sections of the state act. The reversal of the three-judge federal court below did have the effect of a remand on the two sections of the act. Assuming that position to be correct for the purpose of this rehearing, it is apparent, then, that the question of the legality of the decision of the three-judge federal

court in striking down the two sections of the state statute has never been reviewed by any appellate court, until in the cases at bar, when in the Circuit Court the same Circuit Judge sat as presided in the three-judge court which nullified those two sections as violative of the federal laws and constitution (33 F. Supp. 377, 157 F. 2d 744).

13. Promptly after the reversal by the Supreme Court of the United States in reference to this state statute on May 26, 1941, these members of ASCAP, being the respondents herein as music publishing houses, brought actions which would result in the test of the validity of those two sections of the Nebraska statute which the said Circuit Judge and the two District Judges had held violative of the state and federal statutes. In these actions at bar the identical sections were pleaded as a defense under the state statute by petitioners. The single United States District Judge sitting in the cases at bar nullified the sections, but upheld the monopoly section as the Supreme Court had upheld. The trial judge adopted the identical language from the opinion written by the presiding Circuit Judge in the aforementioned three-judge federal court. This opinion of the Circuit Judge on the three-judge court was quoted and adopted as the law of the cases at bar on the identical sections as applied to the identical music publishers.

The music users, petitioners herein as citizens of the State of Nebraska, then appealed their cases, which are the cases at bar, to the United States Circuit Court of Appeals for the Eighth Circuit. There the same United States Circuit Judge was the same Circuit Judge who had presided in the three-judge federal court, and who

wrote the opinion declaring the two sections of the Nebraska statute as violative of the Constitution of the United States and the National Copyright Act (157 F. 2d 744).

15. The petitioners sought certiorari in the Supreme Court by their petition filed on December 9, 1946, Oct. term 1946, Nos. 764-767. The petition was denied on January 20, 1947. It is therefore obvious, as petitioners believe, that there has been a violation of the last sentence of Sec. 216, U. S. C., Judicial Code Sec. 120, because of the sitting of the Circuit Judge on appeal in the cases at bar. The Circuit Court was therefore not properly constituted.

16. Petitioners' position is fortified by the case of *Moran v. Dillingham*, 174 U. S. 153, 19 S. Ct. 620, wherein the Supreme Court, speaking through Justice Gray, stated in reference to a similar question therein adjudicated under the same Judicial Code section:

> "The enactment, alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage. And as 'a cause,' in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part, in the circuit court of appeals, at the hearing and decision of the cause or of any question arising therein. But, how-

ever that may be, a judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the circuit court of appeals on the hearing and decision of any question in the same cause which involves in any degree matter upon which he had occasion to pass in the lower court."

17. The Supreme Court in *Cramp v. International Curtis Marine Turbine Co.*, 228 U. S. 645, 33 S. Ct. 722, 724, said:

"* * * Conceding, however, that the asserted consent was given, the error of the conclusion based upon it is conclusively demonstrated by the construction long since affixed to the statute, and quite recently reiterated and enforced in Rexford v. Brunswick-Balke-Collender Co. supra. Indeed, as pointed out in the Rexford Case, the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the circuit court of appeals, when, without such consent, because of the prohibition of the statute, he would be disqualified from so doing,—a purpose whose public policy is not difficult to understand.

"* * * Under such circumstances we think, as pointed out in Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 267, 268, 54 L. ed. 757, 761, 762, 30 Sup. Ct. Rep. 505, our duty is not to hold the case upon the docket, for ultimate decision upon the merits, but to at once reverse and remand it to the court below, so that the case may be heard by a competent court, conformably to the requirements of the statute."

18. Petitioners also cite *Rexford v. Brunswick-Balke-Collender Co.*, 228 U. S. 339, 33 S. Ct. 515, referred to in the foregoing quotation.

19. Jurisdiction could not have been conferred as shown by the foregoing cases, upon the Circuit Court of Appeals for the Eighth Circuit, in the instant cases, by consent of counsel. Nor has there been a waiver or an estoppel by failure to object to the Circuit Judge sitting when the cases were reached, nor would a failure to file a motion for a rehearing on the grounds now urged, remedy the error, because the Circuit Court was no court at all for any decision on the questions involved.

20. The sections of the Nebraska statute here in question were attacked before the Circuit Judge sitting as an appellate court, upon the same point, i. e., that the sections of the state statute herein in question were passed in violation of the National Copyright Act and the federal Constitution. This is exactly the same question on the same statute and the same parties, even though by representation, as previously were before the same judge when the statute was attacked in the injunction proceedings.

21. On this point the cause should be remanded to the Circuit Court of Appeals for hearing before a properly constituted court.

CONCLUSION

In conclusion, petitioners request a reconsideration and a determination:

1. That for all intents and purposes the two sections of the Nebraska state statute were and are in full force and effect because of the Nebraska saving clause statute and the decision of that state in reference thereto; that

the United States Circuit Court of Appeals for the Eighth Circuit erred in holding that by the repeal of the Nebraska state statute, pending appeal, the appellate court must follow the law as changed.

2. That the petition for certiorari be considered by the Supreme Court of the United States as a petition for review under U. S. C., Sec. 347(b), Judicial Code Sec. 240(b), amended; that the petition for writ of certiorari disclosed the nullification of the state statute by a federal court on federal grounds; that petitioners are entitled to a review upon that point within the limitations of said section.

3. That the United States Circuit Court of Appeals for the Eighth Circuit was illegally constituted, for the reasons set forth under Point III above; that in the event Point II hereof is denied, then as a last alternative petitioners submit that the cause should be referred to a properly constituted United States Circuit Court of Appeals for the Eighth Circuit.

4. Petitioners pray for such other and further relief as may be just and equitable in the premises.

Counsel for petitioners certify that this motion for rehearing and reconsideration is presented in good faith and not for delay.

Respectfully,

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Attorneys for Petitioners.

Counsel for petitioners move this Court to consider the impropriety of the brief filed by counsel for respondents in "Opposition to Petition for Writ of Certiorari."

1. Counsel for petitioners deny each and every one of the statements made in the brief of respondents filed in opposition, which charge counsel for the petitioners with deliberate misstatement of the record. These charges appear on pages 30 to 34 of respondents' brief. The accusations were made in cases pending before this Court. The record will disclose the true facts.

2. The language of the accusation and denunciation directed against counsel for petitioners and used throughout much of opposing counsel's brief (pp. 30 to 34), even though grounded on facts, would subject the writers of the accusations to disciplinary action by this Court.

3. Recently the American Bar Association, under its section of "Legal Education of the Practicing Law Institute," Roscoe Pound, General Editor, issued this statement:

> "There are certain amenities which every lawyer is entitled to expect from his adversary, and which should be accorded to him. One of them is gentlemanly respect and consideration. Briefs should not abound in reckless characterizations of one's adversary or his client. Charges of fraud, chicanery, false statement, etc., as well as intemperate language in describing contentions as absurd, ridiculous, nonsensical, etc., are as unbecoming and undignified as they are unconvincing and ineffectual. Invective and characterization are no substitutes for proof and argument. A much more persuasive method is to state the facts and make the demonstrations which establish

falsity in the adversary's contentions, and let the Court draw the indicated inferences and conclusions."

4. We respectfully submit that the foregoing rule of conduct for counsel has been violated. Sec. 5 of Rule 2 of the Supreme Court of the United States has been violated.

5. Counsel for petitioners invite the Court to determine the propriety of the statements made on pages 30-34 of the brief in opposition.

6. During the trial below in the cases at bar, counsel for petitioners was apparently too indulgent with opposing counsel. Proof is found in the opinion of the trial court (58 F. Supp. 522, 536):

> " * * * The court forbears to express or discuss the uncomplimentary opinion which it entertains touching the deportment, during the taking of depositions, of certain attorneys representing the plaintiffs, who presumptuously and arbitrarily directed witnesses to refuse to answer questions. But those incidents occurred well before the trial of the cases; and, though they would have warranted disciplinary action against the offending individuals or summary ruling touching the further prosecution of the cases by the plaintiffs involved, the defendants did not elect seasonably to seek such remedies or either of them. So, without approving or condoning the misconduct of the offending attorneys, the court will not, at this late date, allow an incident, or even several incidents, of that character to intercept a ruling in these cases upon their merits."

7. This quotation directs this Court's attention to the recorded facts that it has been the custom of the attorneys representing the respondents and their organiza-

tions in these cases to indulge in practices that should be condoned by no court.

8. The conduct of opposing counsel in writing the last pages 30-34, of their "Brief in Opposition" before this Court, is in violation of the Rules of Practice of this Court as above stated. Consequently, the Court's attention is directed to the matter for such action as this Court may wish to pursue in the premises.

9. Counsel for petitioners in the interests of enforcing the Rules of Conduct for attorneys appearing before this bar will proceed further if directed by the Court.

10. The evidence of the misconduct of counsel for respondents is before the Court in their brief prepared by them for respondents and which are on file with the Clerk of this Court.

Respectfully,

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Attorneys for Petitioners.

Dated at Omaha, Nebraska, this 11th day of February, 1947.